

INDEX TO APPENDIX

	Page
Information (Vio. Sec. 11532 H. & S. Code)	1
Minutes of April 5, 1967	2
Transcript of Proceedings	3
April 5, 1967	
Porter, Melvin John	
—Direct	3
—Cross	23, 56
—Redirect	61
Wade, Barry M.	
—Direct	27
—Cross	38
—Redirect	41
Dominguez, Ramon	
—Direct	43
—Cross	54
Blackmore, Daniel	
—Direct	69
Smutz, Robert	
—Direct	70
Davis, Harry Lanier	
—Direct	71
April 6, 1967	
Green, John Anthony	
—Direct	75
—Cross	79
—Recross	95
—Redirect	96

	Page
Minutes of April 7, 1967	91
Declaration of Melvin John Porter	99
Order Granting Probation, May 19, 1967	101
Notice of Appeal	103
Opinion of the Supreme Court of the State of California	104
Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari	119

IN THE
Supreme Court of the United States

October Term, 1969

No. 387

CALIFORNIA,

Petitioner,

vs.

JOHN ANTHONY GREEN.

ON WRIT OF CERTIORARI TO SUPREME COURT
OF CALIFORNIA.

APPENDIX.

INFORMATION.

VIO.SEC. 11532 H.&S. Code.

Superior Court of the State of California for the County of Los Angeles.

The People of the State of California, Plaintiff, v. John Anthony Green, Defendant. S. C. No., No. A-101,149.

The said JOHN ANTHONY GREEN, a person of the age of 25 years is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of VIOLATION OF SECTION 11532, Health and Safety Code, a felony, committed as follows: That the said JOHN ANTHONY GREEN, a person of the age of 25 years on or/between the 1st day of January, 1967 and about the 10th day of January, 1967 at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously sell, furnish, administer and give to Melvin Porter, a minor of the age of 16 years, a narcotic, to wit, marijuana.

EVELLE J. YOUNGER, District
Attorney for the County of Los Angeles,
State of California
By /s/ R. Paul Esnard
R. Paul Esnard, Deputy

Filed in open Superior Court of the State of California, County of Los Angeles, on motion of the District Attorney of said County.

Dated: Feb. 23, 1967, William G. Sharp, Clerk by
W. H. Cox, Deputy.

MINUTES.

Superior Court of the State of California for the County of Los Angeles Department No. 77.

Apr. 5, 1967.

The People of the State of California vs. John Anthony Green Case No. A101149.

APPEARANCES: (Parties and Counsel checked if present. Counsel shown opposite parties represented.)

Evelle J. Younger, District Attorney, by James Ide-
man, Deputy E. J. Hovden, Public Defender, by
Deputy.

X Terrance W. Cooney.

Cause, transferred from Department 120, is called for trial, the jury having been heretofore waived. Melvin John Porter, Harry M. Wade and Ramon Dominguez are sworn and testify for the People. The People's Exhibit 1 (package of marijuana) is admitted in evidence. The People rest. Daniel Blackmore, Robert Smut and Harry Lanier Davis are sworn and testify for the Defendant. Trial is continued to April 6, 1967 at 9:30 A.M. Bail.

REPORTER'S TRANSCRIPT OF PROCEEDINGS.

April 5, 1967.

MELVIN JOHN PORTER, called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Take the stand and state your name, please.

THE WITNESS: Melvin John Porter.

THE CLERK: Will you spell the last name, please.

THE WITNESS: P-o-r-t-e-r.

MR. IDEMAN: Your Honor, I move at this time to exclude all witnesses except for the investigating officer.

THE COURT: Any objection?

MR. COONEY: No objection.

THE COURT: All right.

All persons who are going to testify in this case, please remain in the hallway outside of the courtroom.

DIRECT EXAMINATION

BY MR. IDEMAN:

Q Melvin, how old are you?

A Seventeen.

THE COURT: Speak up, and keep your voice loud and clear.

THE WITNESS: Seventeen.

Q BY MR. IDEMAN: When is your birthday, Melvin?

A March 26th. [11]

Q Back in January of this year, 1967, you were 16 years old; is that right?

A Yeah.

Q Where do you live, Melvin?

A 20809 Bassett, Canoga Park, California.

Q Speak up, please.

THE COURT: Pull the microphone close to you, and sit back and speak right into the microphone.

THE WITNESS: 20809 Bassett.

Q BY MR. IDEMAN: Mr. Porter, do you know the defendant, Mr. Green?

A Yeah.

Q How long have you known him?

A Ever since I lived there in the neighborhood about—let's see—close to about 4½ years.

Q Where does he live?

A Well, he—when I first met him, he had lived down at the corner of Bassett and Gazette.

Q And what?

A At the corner of Bassett and Gazette.

Q Now, Melvin, in January of 1967 did you live there?

A Yeah.

Q Did he live somewhere else?

A He lived at somebody else's house.

Q Do you know where that is? [12]

A I think it was Wayne Kruse—I think that's—I think it was Wayne Kruse's.

Q Where was this?

A On Cozycroft.

Q Was that near your house?

A Oh, about—well, I think five or ten minutes to walk there from my house.

Q How old is he; do you know?

A Twenty-four, I think.

Q Now, Melvin, have you used marijuana in the past?

A Yes, I have.

Q Have you used LSD?

A Yes, a couple of times.

Q How long have you used marijuana?

A Oh, before I was arrested about two—maybe two and a half months.

Q You were arrested in late January, 1967; is that correct?

A Yeah.

Q Now, sometime between the—sometime in early January did you have a conversation with Mr. Green?

A Yeah, he called me up.

Q Now, about when did he call you up in relation to let's say to New Year's Day? How long after that?
[13]

A I really couldn't say. I know it was pretty close to the first of the year.

Q Sometime between the 1st and the 10th, would that be a fair statement?

A Hmm, that would be about right.

Q Did he call you at your home?

A Yeah, I think so, yes.

Q Did you speak with him on the telephone?

A Yes.

Q Did you recognize his voice?

A Oh, yeah, I guess I knew it was him; I guess.

Q You had spoken to him before on the telephone?

A Yeah.

Q Did you have a conversation concerning narcotics?

A Well, he called me up, and he just said that he had some stuff he wanted me to sell.

Q Now, Melvin, what does "stuff" mean as far as narcotics are concerned?

MR. COONEY: Objection, your Honor. It could mean anything. Object to the form of the question.

MR. IDEMAN: Well, I'll withdraw the question.

THE COURT: All right. The question is withdrawn.

Q BY MR. IDEMAN: Melvin, have you associated [14] with other people that have used marijuana or other narcotics?

A Yes, I have.

Q Speak up, Melvin.

A Yeah.

Q Have you heard the word "stuff" used?

A Not very often. I usually call it grass or pot, or something like that.

Q And what does that mean?

A Grass or pot, marijuana.

Q All right, Melvin, what did the defendant tell you over the telephone?

A He just said he had some stuff he wanted me to sell.

Q Did he say what it was?

A No, he just said "stuff."

Q Tell us the details of the conversation as you remember them.

A Well, that's about the whole thing. He just called me up, and he said, you know, "I've some stuff I want you to sell."

Q And what did you say?

A I said, "Yeah, I guess so," you know.

Q Had you ever talked about narcotics with the defendant before that date?

A We might have discussed it, you know. [15]

Q Had you ever discussed your selling any?

A No.

Q What did you do, if anything, after this telephone conversation with the defendant as far as this is concerned, selling the stuff?

A Oh, I just—that was it. I just messed around for a while.

THE COURT: Just a moment; what was that answer?

Read back the answer, Miss Reporter.

(Answer read by the reporter.)

THE WITNESS: Yeah. Well, you know, I mean he didn't come over right away.

Like I already said, I mean I've got a conscience, and I don't want to—

Q BY MR. IDEMAN: I can't hear you, Melvin. Speak up.

A I said that when we were out in the hall earlier, that I'm not that absolutely sure he did come over, because I was on acid at that time.

THE COURT: Acid means what?

THE WITNESS: LSD.

THE COURT: LSD?

THE WITNESS: Uh-huh.

Q BY MR. IDEMAN: Did the defendant bring you something to your house?

A I can't recall. I mean, I think, but I'm [16] not positive. You know, I can't remember that much about the day.

Q Well, what do you think it was that he brought you?

MR. COONEY: Objection, your Honor. It calls for conjecture, "what he thought."

THE COURT: Sustained.

Q BY MR. IDEMAN: Melvin, what is your best recollection of what he brought?

MR. COONEY: Objection, your Honor, again. Assumes a fact not in evidence, that he did bring something.

THE COURT: Sustained; no foundation.

Q BY MR. IDEMAN: Did he bring something to you to your house?

A Not that I recall, he didn't.

Q At the preliminary hearing didn't you testify that the defendant asked you to sell marijuana for him?

A I—to what I recall, I said the same thing.

He called me up and asked me if I would sell some stuff for him.

Q Is it your testimony that you did not say marijuana, or say stuff?

MR. COONEY: Objection, your Honor. At this time counsel is going to impeach his own witness. [17]

MR. IDEMAN: Yes, I am; and I am entitled to under Sections 1235 and 770 of the Evidence Code.

MR. COONEY: I know he has a right, but—

THE COURT: That is not the point. I think the objection is the form of the impeachment.

I think the only thing we have to have is to read the questions and answer that he gave at the previous hearing and ask him if he so testified.

MR. IDEMAN: It is not necessary to do it in that manner any more; however, I will if you wish.

THE COURT: All right, you educate me. What is the difference in the law from that which I learned 40 years ago?

MR. IDEMAN: It changed last January 1st, your Honor. I will show it to you.

May I show the Court?

THE COURT: All right.

(Court perusing a book.)

THE COURT: I don't see that that has changed the rule at all.

I am saying that you don't have to show the transcript of the preliminary hearing to this witness. All you need to do of this witness is not to paraphrase what he said, but ask, "Were you asked the following questions, and did you make the following answers?"

MR. IDEMAN: Very Well. [18]

Q' BY MR. IDEMAN: Melvin, you remember testifying at the preliminary hearing, don't you?

A Yeah.

Q These questions were asked of you. I will ask you whether these questions were asked of you.

MR. COONEY: Counsel, what page?

MR. IDEMAN: Page 5, line 10. These are questions by the District Attorney at the preliminary hearing.

"Q Now, do you recall exactly what date this was?

"A Around the 5th or the 6th.

"Q Where did this take place?

"A At my house.

"Q Was there a conversation that led up to this purchase of some item?

"A He wanted to know if—

"Q As best as you can recall at this time without relating that conversation.

"A Just that he had a kilo of marijuana and —"

And there was some colloquy between counsel and the Court, and the Court asked you—no, this is something the District Attorney said.

"Q I assume you are telling us the substance of the conversation, correct? [19]

More or less what he said and more or less what you said?

"A Yes, more or less.

"THE COURT: We don't have to have the exact words, but use them as much as you can.

"THE WITNESS: Yes.

"THE COURT: All right, now.

"Q BY THE DISTRICT ATTORNEY: Did he at any time say what it was he was selling?

"A Yes, sir.

"Q What did he say?

"A Marijuana.

"THE COURT: How much?

"THE WITNESS: A kilo.

"THE COURT: A kilo?

"THE WITNESS: Yes.

"Q BY D.A. Would you describe how large an item that was?

"A It came in 29 Baggies and in a large shopping bag.

"Q Did you pay him money for this?

"A No."

Q BY MR. IDEMAN: Now, do you remember so testifying?

A Well, not—like I said, I can't remember that much, but— [20]

Q Well, I am asking you now whether you remember being asked these questions and giving these answers at the time of the preliminary hearing?

A Somewhat, yes.

THE COURT: What was the answer?

Read it back, Miss Reporter.

(Answer read by the reporter.)

Q BY MR. IDEMAN: Now, Melvin, is there anything in there, what I have read to you, that is not true, that you did not say at the time of the preliminary hearing?

A Well, like I say, I can't remember what I said at the preliminary hearing.

Q Is it a fact that at the time of the preliminary hearing you were telling the truth as you believed it to be at that time?

A Yes, I believed it to be at that time, yes.

Q I see; and the present testimony is that you don't remember whether the defendant brought you anything?

A After the phone call that—I can't absolutely say that he came over and brought me anything, no.

Q Well, did you—did he give you—whether he came over and gave you anything or not, did he give [21] you a shopping bag?

A No, he didn't have no shopping bag.

Q Did he give you 29 Baggies?

A Not, well, like I was saying—I mean I was on acid, you know, and eventually it gets hard on everything, but that night I was down on—yes, I guess I did have 29 Baggies of marijuana.

Q The night that you talked to the defendant?

A The night after, yes.

Q The night after you talked to him?

A Or the same night.

Q The same night?

A Yeah.

Q Where did you get the 29 Baggies?

A I got them at—I can't—

THE COURT: Are you on acid now, Mr. Porter?

THE WITNESS: No, I'm not.

THE COURT: Are you under any narcotic sedation?

THE WITNESS: No.

THE COURT: Do you understand the questions that counsel is asking?

THE WITNESS: Yeah.

THE COURT: Proceed.

Q BY MR. IDEMAN: Answer my question, Melvin. Where did you get the Baggies?

A I can't—I mean, you know, I can't recall [22] that, you know, how I actually did get them, but I know I got them.

Q The defendant brought them to your house, didn't he?

MR. COONEY: Objection, your Honor; this is leading.

THE WITNESS: No, he didn't.

MR. COONEY: This is leading, your Honor.

The testimony of the preliminary hearing transcript is not to that effect, and so counsel cannot even ask him that for the purpose of impeaching his former testimony.

THE COURT: Your objection will be sustained.

MR. IDEMAN: Whether it is contained in the preliminary hearing transcript or not is of no moment, your Honor, when the witness obviously is turning hostile as he is. I am entitled to take him as a hostile witness and ask him leading questions. I believe that is the state of the law.

MR. COONEY: It could be, but I think good faith must be shown in asking those hostile questions, especially in the context of the previous impeaching—

THE COURT: I think that the record has indicated—I mean the witness' actions so far have indicated a certain hostility by lack of knowledge.

I am just wondering with the state of the [23] admissions this young man has already made, how he is not a co-defendant in this matter, and here testifying as—I mean this is a highly unsatisfactory performance on the part of this young man, as far as I am concerned, in answering questions that are asked of him; but furthermore, as to what he has testified to, as to whether anyone has advised him that he may be incriminating himself in making the answers that he made to you.

MR. IDEMAN: I understand that his case has been handled by the Juvenile Court and concluded now.

That is my understanding; so I don't think this would be an open point.

THE COURT: What is the state of his—

MR. IDEMAN: I understand from the investigating officer that a Petition was filed in the Juvenile Court alleging him to be a delinquent juvenile for furnishing narcotics.

That hearing was held, and the Petition was sustained, and the defendant was granted probation, and I understand he is presently on probation and released from that offense.

THE COURT: Do you know the terms of his probation?

MR. IDEMAN: I do not, your Honor. He hasn't claimed any—

THE COURT: Well, let's proceed a little further, [24] but, as I say, I am not particularly satisfied with the course of the witness' behavior here, and I would like to have further efforts made before we start leading him.

Go ahead, counsel.

MR. IDEMAN: Would you repeat that, please your Honor.

THE COURT: I said that I would like to have some further questions asked of him in a normal fashion before we either lead him or impeach him, and I want to see just how delinquent he is in his answers, and whether or not there may be some other course we might have to take with his attitude.

MR. IDEMAN: Yes, your Honor.

Q BY MR. IDEMAN: Now, Melvin, at any rate, you came into possession of 29 Baggies; is that right?

A Yes.

THE COURT: What did you say?

THE WITNESS: Twenty-nine.

Q BY MR. IDEMAN: What did these Baggies have in them?

A Marijuana.

Q Did you recognize those as being marijuana?

A Yeah.

Q From your previous experience with it?

A Uh-huh.

Q Did you smoke some of this marijuana? [25]

A Yeah, I did.

Q Did you make it into cigarettes?

A Uh-huh.

Q Describe how you do that, Melvin.

A What? I didn't understand you.

Q Describe how you make cigarettes out of the marijuana.

A I just took and cleaned it with a—what do you call that?

Q A strainer?

A Oh, yeah, and got some rolling papers and put some in there and rolled it up like a cigarette.

Q When you smoked the cigarettes, how did they make you feel?

MR. COONEY: I object to this.

THE COURT: Counsel, just a minute, please.

(Proceedings had on unrelated matters.)

THE COURT: Thank you. Go ahead, please.

MR. COONEY: Well, I will withdraw my objection.

Q BY MR. IDEMAN: Melvin, the question was, how did smoking the substance make you feel? Describe how you felt.

A You mean physically or—

Q Physically and mentally.

A Physically I felt kind of tired. Mentally, well, you know,—I don't know. I just usually listen [26] to the record player, and, you know, the sounds are more—I don't know how you actually describe it, but let's see.

Well, it makes you feel kind of superior in a way.

Q Did you feel kind of high?

A Oh, yes, if that is what you mean.

Q Did you feel about the way you did when you smoked pot on other occasions?

A Oh, yes.

Q Did you sell any of these Baggies of marijuana?

A Yeah, I sold a few of them.

Q Did something happen to the rest of them?

A Yes, sir, they were stolen.

Q From where?

A From my closet.

Q About how long was that after you got the full amount of the 29 Baggies?

A Well, it was before the policeman that came out that I sold the stuff to.

It's a Negro buyer. You see, he came before the 10th. It was before the 10th.

Q So you only had them a few days?

A Yeah.

Q So you sold a few, and you smoked a little, and much of it was stolen? Is that what you are saying?

[27]

A Yes.

Q Among the Baggies that you sold, you sold one to an officer, Officer Dominguez; is that correct?

A Yeah, Officer Dominguez.

Q You didn't know he was an officer at that time?

A Not that day, no.

Q But you later learned that the day when he arrested you?

A Well, I knew before that, I knew the following day.

Q But you didn't know that at the time that you sold it to him?

A No, no.

Q Now, do you remember clearly that the rest of the marijuana was stolen from your house?

A Yes, it was stolen.

Q You have a clear recollection of that?

A Yes.

Q You have a clear recollection of selling to Officer Dominguez?

A Yeah.

Q And you have a clear recollection of talking to the defendant on the telephone before you got the Baggies, right?

A Yes. [28]

Q But you do not have a clear recollection of how you came into possession of the 29 Baggies?

A No, you see, I got up in the morning, and I took the acid. Then he called about 20 minutes later, and about—

Q You say "he called." Whom do you mean?

A John.

Q The defendant, Mr. Green?

A Yeah, he called about 20 or 30 minutes later, and then about half an hour or 45 minutes after that. I was under the influence of it, and that's all.

Q Now, did somebody—these 29 Baggies containing marijuana, did they come all in a shopping bag?

A Yes.

Q Did somebody tell you where you would find the shopping bag?

A I suppose someone did tell me.

Q Do you remember who that was?

A No, I can't say absolutely.

Q Do you know where Mr. Green's father's house is?

A Yes.

THE COURT: What was the question?

Q BY MR. IDEMAN: Do you know where Mr. Green's parents live?

A Yes. [29]

Q Where was that back in January?

A At the corner of Bassett and Gazette.

Q Did you get the shopping bag there?

A I might have. You know, I knew John called, and I mean—

MR. COONEY: I move to strike the answer, "I might have," as a speculation, your Honor.

MR. IDEMAN: Well, that is—

THE COURT: That is the best of his recollection at this time.

MR. COONEY: Well, he might have, and he might not have. It assumes a fact not in evidence.

THE COURT: Well, that is for you to cross examine the witness on, counsel.

I am aggravated at his reluctance to act as a normal witness to respond to questions that have been asked of him.

For your information, counsel, "he might have," doesn't mean very much to me, but I think it is his best recollection at this time.

Q BY MR. IDEMAN: Now, Melvin, after you talked to the defendant when he asked you to sell some stuff for him, did you see him in person? When is the next time you saw him in person after that?

A I think I might have seen him that day, but I couldn't be positive. It was the day before or the [30] day after.

Q I am going to read to you, Melvin, some testimony from the preliminary hearing. I want you to listen to it to see whether or not it is the testimony that you gave at the preliminary hearing. Do you understand?

A Uh-huh.

MR. IDEMAN: Page 12, counsel, at line 5.

This is cross examination at the time of the preliminary hearing by Mr. Cooney.

Listen now, Melvin.

"Q You say that Mr. Green came over and talked to you on the 5th or the 6th of January?

"A Somewhere around there, yes, sir.

"Q This was at your home?

"A Yes, sir.

"Q Was anybody else home at that time?

"A No, sir.

"Q Now, prior to the 5th or the 6th of January, did you have any marijuana on your premises?

"A What do you mean, sir?

"Q Did you have any at home?

"A When he came over?

"Q Before he came over. [31]

"A Yes, I had some.

"Q You had some already; is that correct?

"A Not until the time when I received his, no, but I had some others, yes.

"Q You had no marijuana in your house, to your knowledge, until Mr. Green came over; is that correct?

"A Oh, yes, I had some there.

"Q Mr. Green came over, and what did he say to you? Try to use the exact words that he said, if you can.

"A Just that he wanted me to sell or, you know, to sell the stuff that he had given me, and to give him the money when I got it.

"Q He said, 'I've got some stuff here. I would like for you to sell it.' Is that correct?

"A He said marijuana.

"Q He used the word marijuana; is that correct?

"A Or grass, yes.

"Q What did he use? Grass?

"A Mostly grass or marijuana, yes.

"Q Are you giving me a choice?"

Then there was an admonition by the Court.

"THE WITNESS: Well, I'd say marijuana. [32]

"Q BY MR. COONEY: You actually recall him saying marijuana, or are you just guessing that he might have said that?

"A I'm pretty sure that is what he said.

"Q Did he have a shopping bag with him at the time?

"A No, he didn't.

"Q Actually where did you get the shopping bag?

"A Over at his father's house, his parents' house.

"Q But he didn't hand it to you, did he?

"A No, he showed me where it was, and I went and got it."

Q BY MR. IDEMAN: Now, Melvin, up to this point the questions and answers that I read to you, are those the questions that were asked of you at the preliminary hearing and were those the answers that you gave?

A Well, as well as I can remember, yes.

THE COURT: Read back the answer, please.

(Answer read by the reporter.)

Q BY MR. IDEMAN: You were telling the truth at the time that you were testifying then; is that right?

A Yes.

MR. IDEMAN: Counsel, continuing on on page 14.

"Q Now, this is on the 5th or the 6th that you had a conversation with him at your house; is that correct?

"A Yes. It was at my house.

"Q After this conversation took place a day or two later you went over and picked this stuff up?

"A I think this was that night, yes, sir.

"Q Was it that night or the following night?

"A I think it was that night.

"Q Now, when you picked up this stuff from his father's house, was Mr. Green home?

"A I wouldn't know, sir.

"Q Where did you pick it up?

"A From his back yard, sir.

"Q Nobody was there when you picked this stuff up; is that correct?

"A I wouldn't know. He just told me to go in the back yard."

MR. COONEY: I object to this, your Honor. An objection was made to this at the time of the preliminary hearing, and it was stricken.

MR. IDEMAN: Yes, that was stricken; I'm sorry. Where it says, "I wouldn't know," that is [34] out.

THE COURT: All right.

MR. IDEMAN: Now, these are further questions by Mr. Cooney.

"Q Nobody—"

THE COURT: Excuse me. What was— Miss Reporter, read me back the one that was stricken.

(The record was read by the reporter.)

MR. IDEMAN: Yes, the one that was stricken was, nobody was there when he picked this stuff up. Then there was an answer, and the answer was stricken.

Now, these are questions continued by Mr. Cooney at line 21, page 14.

"Q Nobody was present in the back yard when you picked it up, the shopping bag; is that correct?

"A No, sir.

"Q Nobody was home; is that right?

"A I don't know if anybody was home. Nobody was in the back yard.

"Q Nobody was in the back?

"A No.

"Q Where was the shopping bag?

"A It was behind the garage, behind the bush.

"Q It was behind the bush? [35]

"A Yes."

Q BY MR. IDEMAN: Now, were those questions asked of you, and did you give those answers at the preliminary hearing?

A Yes, I guess so, yes. I'm pretty sure.

Q Does that refresh your recollection as to where you got that shopping bag full of marijuana?

A Well, I mean—like I already said, I can't be that sure. I mean—

Q Melvin, my question is, my reading the questions and answers to you, does that refresh your recollection? Does that make you remember where you got that shopping bag of marijuana?

MR. COONEY: Objected to on the grounds that it has been asked and answered, your Honor.

THE COURT: Go ahead. Overruled.

THE WITNESS: I guess so, yes.

Q BY MR. IDEMAN: I beg your pardon?

A I guess so, yes.

Q All right. Now, with your recollection refreshed, would you tell us of your own knowledge, where did you get that bag of marijuana?

A Well, I guess I got it from his back yard.

Q Whose back yard?

A John's.

Q Do you mean the defendant's? [36]

A Yes, I guess so.

Q Did he point it out where it was?

A I guess so.

Q Did you get any money for selling this marijuana? The bags that you had managed to sell?

A Yes.

Q What did you do with the money?

A I gave it to John, I think.

Q To the defendant?

A Yes, I guess.

MR. IDEMAN: Cross examine.

CROSS EXAMINATION

BY MR. COONEY:

Q Now, Mr. Porter, you have testified that on the day that Mr. Green phoned you, you had taken some LSD; is that correct?

A Yes.

Q And before that time you had also taken LSD's in the past; is that correct?

A A few times, yes.

Q Now, tell us what reaction this LSD produced in you.

A Well, it is hallucitory—I mean it makes you hallucinate things.

Q It makes you think things are happening [37] that really aren't happening?

A Yes.

Q And is this the reason why you have been uncertain as to what happened after Mr. Green phoned you on the telephone?

A I just can't absolutely—I don't remember. I mean, you know, I can't absolutely say if he did, or, you know, come over or not. I am not that positive.

Q In other words it is difficult for you at this time to distinguish between what your hallucinations were and what actually took place; is that correct?

A Yes, I guess so.

Q Now, after you have taken a dose of this LSD, does the hallucination it creates recur at a later time?

A What do you mean?

Q Well, after the effects wear off—say, you take it on a Sunday, and it lasts for a few hours; is that correct?

A About 12—about 12 to 14 hours.

Q And after that wears off, do you have these hallucinations at a later time without taking another dose?

A Yes, sometimes, yes.

Q Now, the Deputy District Attorney has read to you certain testimony and has asked you some questions [38] concerning that.

Now, did that refresh your recollection as to what you testified to at the time of the preliminary hearing?

A Yes.

Q Now, did it refresh your recollection as to what actually happened that first week in January?

A Well, I could remember more then; but if that is what I said, that is probably what happened, yes.

Q Did it merely refresh your recollection as to your testimony at the time of the preliminary hearing, or did it refresh your recollection as to what actually happened?

A Mostly my testimony, I guess.

Q So you are still unsure as to actually what happened after Mr. Green had phoned you on the telephone, and after you had taken this dose of LSD; is that correct?

A Do you mean am I uncertain?

THE COURT: Read back the answer, please.

(Answer read by the reporter.)

Q BY MR. COONEY: Yes, that's the question.

A Yes, I'm not positive now.

Q Now, Mr. Green didn't tell you to take that dose of LSD, did he?

A No.

Q Now, prior to January of this year had [39] Mr. Green sold you an automobile?

A Yes, he had.

Q And this money that you gave, that you testified giving to Mr. Green, was this as partial payment for the purchase of this automobile?

A Yes, I paid him for the automobile.

THE COURT: Miss Reporter, read back the question and answer, please.

(Record read by the reporter.)

MR. COONEY: Nothing further at this time, your Honor.

MR. IDEMAN: I have no other questions at this time, your Honor.

I would ask the Court to instruct the witness to remain, however.

THE COURT: All right.

Let me ask you, Mr. Porter.

THE WITNESS: Yes.

THE COURT: Had you taken your LSD before Mr. Green called you on a particular day early in January, or did you take it after he called you?

THE WITNESS: No, just before, about 20 minutes before he called me.

THE COURT: It is your statement to the Court that you do not remember what he said to you because you had 20 minutes earlier taken a dose of LSD. Is that what [40] your statement is?

THE WITNESS: I said that—well, he asked me if I could sell some stuff for him. Yes, that's what I said.

THE COURT: You never discussed the word "marijuana" or used any other words except "stuff"; is that what your statement is?

THE WITNESS: Oh, he might have. I mean—I mean this is all about three months ago. I can't remember that far back.

THE COURT: Well, is it because of the use of the LSD at that time that your memory is bad today?

THE WITNESS: No, I have always had a not very good memory.

THE COURT: All right. Step down. You may remain outside.

MR. IDEMAN: People will call Officer Wade.

BARRY M. WADE,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated and state your name, please.

THE WITNESS: Barry M. Wade; W-a-d-e. [41]

DIRECT EXAMINATION

BY MR. IDEMAN:

Q Officer Wade, what is your occupation?

A I am a police officer for the City of Los Angeles, assigned to the Juvenile Narcotics Division.

Q Are you the investigating officer in this case?

A Yes.

Q In connection with your investigation of this case, did you have a conversation with a Melvin John Porter, the previous witness?

A Yes, I did.

Q When and where did that conversation take place?

A That was on January 31, 1967 at 4:00 P.M. at the Juvenile Division Headquarters.

Q Who was present at that time?

A Melvin Porter and myself.

Q What was his condition as far as sobriety or being under the influence of any drugs were concerned at that time?

A He was sober at the time.

Q And did you have a conversation with him pertaining to this case?

A Yes, I did.

Q Tell us what he told you. [42]

MR. COONEY: I object to this at this time, your Honor.

Counsel has impeached his own witness. Now he attempts to bring in an officer to show prior consistent

statements for the purpose of rehabilitating the witness, that is already impeached.

MR. IDEMAN: Oh, no, no. This statement comes in not for the purpose of rehabilitating the witness. It comes in as an affirmative evidence in the case—I might invite the Court's attention to Sections 1235 and 770 of the Evidence Code—without foundation and not limited to impeachment. It comes in as evidence in the case.

THE COURT: Is this going to be in the form of an admission or confession?

MR. IDEMAN: Not the statement of the defendant, your Honor. This would be the statement of the previous witness.

THE COURT: Yes, but I mean—you see, to me it is hard to understand how, from the position of the—the state of the record, this previous witness is not also a co-defendant here. I presume that is because he is a juvenile; that he has been made a ward of the Juvenile Court; and once having been made a ward of the Juvenile Court, what status does that place his posture in this situation?

MR. IDEMAN: Well, I don't believe I follow you, [43] your Honor.

THE COURT: Well—

MR. IDEMAN: Could he be prosecuted for some offense now? Is that what your Honor is asking?

THE COURT: The fact that he has been made a ward of the Juvenile Court, as I understand what the statement of the District Attorney was, that he has been found to be a delinquent and has apparently been given some type of a probation—

MR. IDEMAN: Yes.

THE COURT:—now is he a—

MR. IDEMAN: Is he a possible defendant in a criminal case? Is that what your Honor is asking?

THE COURT: Yes, what is his possible involvement in this matter now?

MR. IDEMAN: Practically or legally?

THE COURT: Practically and legally.

MR. IDEMAN: Practically, the case against him is over. That is all there is.

Legally, I am not familiar with Juvenile Court Laws.

At any time if he wanted to assert his right against self-incrimination, the District Attorney's Office would immediately prepare immunity papers and have them signed by him. It is a matter of 30 minutes to an hour to get the Presiding Judge in Department 100 to issue [44] the proper papers, and he is immunized, and he can never be prosecuted by anything arising out of his testimony, but he did not claim that privilege, probably realizing that nothing out of this could happen to him.

Of course, this officer's testimony here won't affect that at all, because this was given in a proceeding against that witness and not—

THE COURT: It does, though, to this extent: What was this witness trying to do? Exonerate himself from any implications or liability? In other words, what concerns me most is what is the probative value as to this 16 year old who comes in here and defies the Court and counsel with his non-responsive, insolent answers. Is this done because he fears he is in the shadow of a criminal charge, or because he is addicted on LSD or marijuana, or is he just a bad delinquent and—what I am concerned about is what led up to why he would make some statements or confessions or admissions, whatever it was to these officers.

MR. IDEMAN: I think that is a proper area for cross examination, and I think your Honor will and should consider this in deciding what weight should be given to the statement he made to the officer.

Now, to comment on the Evidence Code, Section 1235, as your Honor is aware, changed the law, and now his statement comes in as evidence in the case, and [45] the comments of the drafters of Section 1235 are interesting. Let me read to your Honor—

THE COURT: All right.

MR. IDEMAN:—because I think it will cast some light on it.

THE COURT: There is another thing. Once being found a delinquent is the same as being found—the same as a felon. In other words, here is a charge that he has been held up on, which if tried as an adult, would make him a felon. Is he testifying under the cloud of a—as a felon?

I mean, to me these things are puzzling me as to what the status of this young fellow is now as he testifies.

MR. IDEMAN: Well, he doesn't have a felony conviction. No proceedings by the Juvenile Court can result in a felony conviction even if he is committed to the Youth Authority.

His exact status, I am not sure. He is a ward of the Court. He is on probation to the Juvenile Court.

I don't think it was brought up on cross examination. He is still here.

THE COURT: Well, I am talking out loud to both of you.

What concerns me about this apparently [46] worthless type of youth—

MR. IDEMAN: Well, I will say this to the Court.

I didn't make an opening statement in this case, but I think the evidence will show that this young man sold marijuana to an undercover officer. That would be proven, which will show that he as a man—a boy of 16—got marijuana somewhere. Somebody gave him marijuana. Now, the question is going to be who did it.

THE COURT: What is your objection, counsel, to this witness' testimony?

MR. COONEY: Well, your Honor, I am not familiar with the Evidence Code as opposing counsel is, but to me this would sound like the rankest form of hearsay.

At the expense of sounding somewhat poetic, I will say this:

THE COURT: Well, let me ask this, counsel, to make an offer of proof as to what this officer will testify to.

This was done to the officer to whom he sold the marijuana?

MR. IDEMAN: No, no, your Honor.

THE COURT: This is just to the investigating officer?

MR. IDEMAN: The Juvenile Narcotic Investigating Officer, yes. [47]

The offer of proof, your Honor, I would have to read from the police report as follows:

The officer will testify that the witness, Melvin John Porter, told him at the time and place referred to that between January 1, 1967, and January 10, 1967, he, the defendant, called Melvin at Melvin's home, and he told him that he was obtaining a kilo of marijuana and wanted to know if he could leave it at his, Melvin's, house.

The defendant came over to the house between 2:30 to 5:30 P.M. with a shopping bag containing 29 Baggies, approximately one kilo, containing a brown leafy material known to Melvin as marijuana.

The defendant gave Melvin the entire contents to keep in Melvin's bedroom closet.

The defendant told Melvin he could have one bag for himself and retain the remainder for the suspect, for the defendant, who would pick it up at a later date.

Melvin told the officer he made four or five cigarettes from the material and smoked them.

When he smoked them his throat got dry, and his eyes got red, and he got high and intoxicated after smoking the cigarettes.

On the 10th of January, 1967, at 12:45 P.M. Melvin sold a portion of this material that came from the [48] defendant to the undercover police officer, Officer Dominguez.

That the victim further went on—during the last five months the defendant has brought large quantities of marijuana to Melvin's home and has given it to him to hold.

On numerous occasions Melvin has taken some for himself and has paid the defendant for it.

That the—Melvin was—that the defendant would leave marijuana and LSD with Melvin; that the defendant would tell Melvin who was going to come and pick it up, and the purchasers would come to Melvin's house and pay him for the marijuana and LSD, and that Melvin would give the money to the defendant at a later date; and that during the five months preceding the conversation the defendant delivered large quantities of marijuana to Melvin approximately once a week.

Now, that is highly material. Whether your Honor believes it or not, of course, that is up to the Court.

THE COURT: I was going to say, that is the problem.

MR. IDEMAN: It goes to the weight, but let me just read to your Honor the comments which I think is important.

"Section 1235 permits an inconsistent [49] statement of a witness to be used as substantive evidence if the statement is otherwise admissible under the conditions specified in Section 770, and it is because it pertains to a witness who has not been excused, which do not include surprise on the part of the party calling the witness if he is the party offering the inconsistent statement.

"Because 'Section 1235 permits a witness' inconsistent statements to be considered as evidence of the matters stated and not merely as evidence casting discredit on the witness, it follows that a party may introduce evidence of inconsistent statements of his own witness whether or not the witness gave damaging testimony, and whether or not the party was surprised by the testimony, for such evidence is no longer irrelevant and hence inadmissible.

"Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely non-existent. The declarant is in court and may be examined and cross examined in regard to his statements and their subject matters.

"In many cases the inconsistent statements [50] is more likely to be true than the testimony of the

witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversies that gave rise to the litigation.

"The trier of the fact has declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court.

"Moreover Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case."

Now, your Honor, the evidence is clearly admissible. Clearly the intent being that the framers of this particular Section realize what we all know, particularly in a case like this, the young man is more likely to tell a true story shortly after his arrest and not months later after he has had a chance, perhaps, to be conditioned by various factors that may have happened [51] to him.

Whether or not—what weight your Honor wants to give to it, that is up to your Honor. You may give it great weight. You may give it no weight, but it is material to the case, terribly material.

THE COURT: What is your position, Mr. Cooney?

MR. COONEY: Well, your Honor, I think that counsel is trying to prepare a case entirely out of patches.

Now, he has read in his offer of proof—he has read a third version. Now, we have heard a third version of this story.

A

This does not rehabilitate his testimony at the preliminary hearing. This is the third version to impeach that version of the testimony of the preliminary hearing.

Now, we have three different stories, and counsel is attempting to introduce the third story further in asking your Honor, "Look, take your pick, whichever one you want. We have still got him."

THE COURT: Well, that is not what is disturbing me as much as it is the—if the offer of proof which he made is allowed to be introduced, it is on other material besides which is the question of inconsistent statement.

MR. COONEY: I know he went pretty far afield [52] in reading this statement from the police report.

THE COURT: In other words, I think the only thing that this officer can testify to is to anything to which this defendant has given an inconsistent statement.

MR. IDEMAN: Do you mean the witness?

THE COURT: No, I am now talking about Porter.

I don't think we have any right to go into all of the statements made that goes back five months to—say, we had a jury here and intimate by insinuations that a course of conduct has prevailed which would seduce us into believing that having done this all this time that certainly he must have done it on the occasion, the one time which he is charged with on the 10th day of January, 1967.

I think that the only thing that this witness can now tell us of the conversation he had on January 31st, is anything that related to the acquisition of the merchandise that is alleged to have been given to him by the

defendant on or before the 10th day of January, and not go back into anything that relates to some course of conduct over a five-months period.

MR. COONEY: That is true.

MR. IDEMAN: Well, I will direct my question to the officer only for that period then.

MR. COONEY: Wait a minute; one further thing, [53] your Honor. That is, this statement that he gave to the officer must tend to corroborate the prior testimony at the preliminary hearing. I mean, it is for the purpose of showing the prior consistent testimony—I mean, the prior consistent statement of the witness.

MR. IDEMAN: No, it is not.

MR. COONEY: Well, I don't really understand.

MR. IDEMAN: It is an inconsistent statement made by him at a time just after his arrest.

I think the evidence will bear this out, and your Honor is going to have to decide which, if any, of the versions of the witness' testimony are true.

It is very obvious to the Court that the statement to the officer is very detailed. At the preliminary hearing it is less so; and here at this trial it is even less so; and so I suspect in another month or two he won't even know his own name; or ever have seen the defendant before.

THE COURT: Actually, the inconsistency of this young man today as compared with the preliminary hearing testimony was his only recollection of the word "stuff," and that he doesn't recall how he came into the 29 Baggies of marijuana.

MR. IDEMAN: Yes, and that latter point is the crux of the case, is it not?

THE COURT: All right. So, those are the two [54] matters which I am going to rule that this officer

can testify to because of the inconsistencies on those two subjects.

MR. IDEMAN: All right. May I frame the question to the officer?

THE COURT: Yes.

Do you understand, Officer? I want you to limit yourself to just as though we had a jury over there.

THE WITNESS: Yes.

MR. IDEMAN: All right—

THE COURT: Just a minute, counsel, let's take care of the other counsel who have been here waiting for the jury verdict.

(Proceedings on unrelated matter.)

THE COURT: All right, go ahead and frame your question, counsel.

Q BY MR. IDEMAN: Officer Wade, tell us what the defendant (sic) told you about how he came into possession of the 29 Baggies of marijuana.

A Mr. Porter told me that the defendant, Mr. Green, called him up in the morning and stated that he had a kilo of marijuana, and he wanted to know if he could bring it over and leave it at Mr. Porter's house.

I asked Mr. Porter if he said marijuana, and he said he thought he used the word "stuff" or "grass." [55]

I then asked what he meant by, "stuff" or "grass" and he said "marijuana."

I asked him what his reply was to Mr. Green, and he said that his reply was that he could bring it over to his house later on that day.

Mr. Porter told me that later on that afternoon Mr. Green came over to his house with a brown shopping bag, containing 29 wax bags containing a green leafy material, which Mr. Porter recognized as resembling marijuana.

MR. IDEMAN: Thank you, that's all.

Cross examine.

THE COURT: Did we get the foundation as to what date this was that he said it was?

MR. COONEY: I think it was January 31st.

THE COURT: I have the date, but what day was it that the proposed conversation between the defendant and Mr. Porter occurred?

Q BY MR. IDEMAN: When was that supposed to have occurred?

A This occurred sometime between January 1, 1967, and January 10th of 1967.

Q That was as close as he could pinpoint it down for you?

A Yes.

MR. IDEMAN: That's all. [56]

CROSS EXAMINATION

BY MR. COONEY:

Q Officer, you testified that the defendant—that Mr. Porter appeared to be sober to you at the time his statement was made; is that correct?

A Yes.

Q How much previous to the time the statement was made was he arrested?

A Approximately three or four days prior to that.

Q He had been arrested three or four days prior?

A Yes.

Q All right. Now, you have heard Mr. Porter testify earlier that he has taken LSD's and that many times these—he stays high or has the hallucinations for a period of from 12 to 14 hours, and then even at a later time, days later, these hallucinations can recur without

him taking any additional LSD's. Did you hear him testify to that?

A Yes.

Q Do you know whether or not Mr. Porter was having any hallucinations induced by LSD at the time the statement was made by him?

A In my opinion he was not under the influence of LSD at this time. [57]

Q How do you tell if someone is under the influence of LSD? The pupils don't dilate, do they?

A No, sir.

Q Actually, a person has no outward appearance of being under the influence of something do they?

A He does have an outward appearance if he is under the influence of LSD in many cases.

Q Have you observed Mr. Porter while he was under the influence of LSD?

A No, I haven't observed Mr. Porter while he was under the influence.

Q It is true—have you observed any people under the influence of LSD?

A Yes.

Q How many people have you observed under the influence of LSD?

A Approximately five.

Q Isn't it true that each person will react somewhat differently to the administration of a dose of LSD?

A Yes, sir, that is true.

Q Some will get sleepy, and some will get extremely high; is that correct?

A Yes.

Q And others will range from between those [58] extremes; is that correct?

A Yes, sir.

Q Mr. Porter was not sleepy at the time he made this statement, was he?

A No.

Q He was not extremely high?

A No, sir.

Q He was somewhat between those two attitudes; is that correct?

A He was, sir, but I would like to explain my answer.

THE COURT: All right. He was between what?

THE WITNESS: He was between the symptom of being sleepy and between the symptom of being high. However, he was not within the—he was not acting in a manner in which I had observed other people act while under the influence of any narcotics or drugs in that he was not acting in a, shall we say, far out manner. He was acting normal like you and I.

Q BY MR. COONEY: You were present at the time of the preliminary hearing, were you not?

A Yes, I was.

Q And at that time you heard Mr. Porter testify that he went over into the back yard of Mr. Green's parents' home and got this marijuana?

A Yes., [59]

Q And at that time you knew that this was inconsistent with the previous statement that he made to you on January 31st; isn't that correct?

A Yes, sir.

Q Did you talk to Mr. Porter about this after the preliminary hearing?

A No, sir.

Q And it is your testimony that on January 31st, 1967, Mr. Porter's conduct and appearance did not

resemble these other five people that you observed as being under the influence of LSD; is that correct?

A Yes.

Q Now, at the time that statement was made by Mr. Porter to you, had you advised him of his Constitutional rights?

A Yes, I had.

Q He was—was he in custody at the time?

A Yes, sir.

Q Had charges or a Petition been filed against him?

A I had filed a request for a Petition with the Juvenile Court prior to talking to him.

Q And this was a conversation which was solicited by you?

A No, sir.

Q I mean; did you go to see Mr. Porter for [60] this conversation?

A I received a request from his mother to go talk to him.

His mother told me that—

Q Well, now, wait—we're not concerned with what his mother said, but you went pursuant to a request by his mother; is that correct?

A Yes.

REDIRECT EXAMINATION

BY MR. IDEMAN:

Q Officer, how long had he been in custody when you interviewed him?

A I believe three or four days. He was arrested on the week end.

Q Three or four days?

A Yes, sir.

Q How long does it take for the effects of LSD to wear off normally?

MR. COONEY: Well, I object—

THE COURT: Well, I think we have an expert that has already testified.

He says 12 hours. I don't think this man has seen but about five people—in other words, he has only seen five people. How can he testify as an expert?

MR. IDEMAN: Counsel has treated him as one; [61] so I am entitled to—

THE COURT: Sure, but we have an expert who just testified, that 16-year-old youth in here that says it lasts 12 hours.

That is the nearest thing to an expert testimony, I think, that we have heard so far.

MR. IDEMAN: Very well, that is all.

THE COURT: Step down, Officer.

MR. IDEMAN: Officer Dominguez, please.

THE BAILIFF: Your Honor, Officer Dominguez had to go to move his car. He will be back in a moment.

THE COURT: Well, this is a good point to take our afternoon recess, at this point.

(Recess.)—

THE COURT: All right, is our next witness available?

MR. IDEMAN: Yes, sir, Officer Dominguez, please.

RAMON DOMINGUEZ,

called as a witness by and on behalf of the People, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated, please and state your name.

THE WITNESS: Ramon Dominguez; D-o-m-i-n-g-u-e-z.

THE CLERK: Will you please spell your first name? [62]

THE WITNESS: R-a-m-o-n.

DIRECT EXAMINATION

BY MR. IDEMAN:

Q Officer, what is your occupation?

A I am a police officer for the City of Los Angeles, assigned to Central Patrol.

Q Central Patrol?

A Yes, sir.

Q In January of this year were you a Los Angeles police officer then?

A Yes.

Q Were you assigned to Central Patrol then?

A No, I was assigned to Central Narcotics.

Q Were you working as an undercover officer at that time?

A I was.

Q As an undercover officer, were you attempting to purchase narcotics from narcotic sellers?

A That's correct.

Q In January, 1967, did you purchase some marijuana from a Melvin John Porter, the previous witness?

A I did.

Q When was that?

A I don't recall the exact date. It was in January in which I made a purchase of narcotics from [62A] Melvin Porter.

Q In connection with your—

THE COURT: What date was the purchase?

MR. IDEMAN: He didn't say, your Honor.

MR. COONEY: He doesn't remember.

THE WITNESS: I don't remember.

THE COURT: Do we have the record?

MR. IDEMAN: Yes.

Q BY MR. IDEMAN: Did you make a police report pertaining to Mr. Porter?

A Yes, I did.

Q When you made that report, at the time the events were fresh in your mind; is that correct?

A That's correct.

Q Does that report contain the date upon which you made the purchase?

A Yes, sir.

Q If you could look at your report, would that refresh your recollection?

A Yes, sir, it would.

MR. IDEMAN: Have you seen this, counsel?

MR. COONEY: No, I haven't.

(Mr. Cooney looking at a document.)

Q BY MR. IDEMAN: Officer, I show you this arrest report. Is this the arrest report that you participated in making on Melvin John Porter? [63]

A Yes.

Q Is that the report?

A Yes, sir, it is.

Q All right. Can you tell, after refreshing your recollection by looking at that report, can you tell us the date on which you bought some marijuana from him?

A It was January 10, 1967.

Q At what time and at what place did you make the purchase?

A At 12:45 P.M. at 20809 Bassett Street, Van Nuys.

Q Is that his residence?

A Yes, sir.

Q You were dressed in an undercover type of garment; is that right?

A Civilians.

THE COURT: Whose residence?

MR. IDEMAN: Mr. Porter's residence?

THE WITNESS: Yes.

THE COURT: Is that the Porter residence?

MR. IDEMAN: Right.

Q BY MR. IDEMAN: You were not wearing a uniform at that time?

A No, I was not.

Q You had not identified yourself as a police officer up to that time, had you? [64]

A Certainly not.

MR. IDEMAN: Your Honor, I have an analyzed envelope of the Los Angeles Police Department. It bears a DR number of 67-402-266.

I ask that the envelope and its contents be marked as People's 1 for identification.

THE COURT: Have you reviewed it, or do you have any objection as to what it is?

MR. COONEY: No, I will stipulate to its going into evidence at this time.

MR. IDEMAN: All right, fine.

THE COURT: What is the analysis? Can you agree upon it?

MR. COONEY: We have stipulated that—

MR. IDEMAN: We are going to—I was about to offer that stipulation, your Honor.

THE COURT: All right.

MR. IDEMAN: People offer to stipulate that W. G. Penprase be deemed called as a witness by the People, duly sworn and qualified as an expert forensic chemist; that he testified that he is employed by the Los Angeles Police Department;

That in this capacity that on January 11, 1967, he received from the Property Division of the Los Angeles Police Department this package now marked People's 1 for identification; [65]

That it was sealed with a red sealing wax at the time he received it.

He opened up the envelope by breaking the seal, by cutting around the seals, examined the contents and found the following: Two rubber bands and a plastic bag which he marked "P", which contained 20 grams of marijuana, made a chemical and physical examination and formed the opinion that the substance was in fact marijuana;

That he prepared this report, replaced the bag into People's 1 for identification and returned People's 1 for identification to the Property Division of the Los Angeles Police Department on January 11, 1967.

THE COURT: All right. Stipulated?

MR. COONEY: Stipulated, your Honor.

MR. IDEMAN: Can we also stipulate that—

Q BY MR. IDEMAN: Officer Dominguez, did you bring this bag to court at the preliminary hearing?

A It appears. If I may check it.

(Witness examining the article.)

Yes, this is the one. It has my name and my serial number on it.

MR. IDEMAN: May it be stipulated that Officer Dominguez checked this out, People's 1, out from the

Central Patrol Division on February 8, 1967, took it to Division 68 of the Los Angeles Municipal Court where it was [66] received into evidence, and it has been in custody of the Superior Court Clerk up to this date.

MR. COONEY: So stipulated.

Q BY MR. IDEMAN: Officer, will you open this People's 1 for identification?

A Yes.

THE COURT: People's 1 in evidence by stipulation, isn't it?

MR. COONEY: Yes.

MR. IDEMAN: It is in? All right.

MR. COONEY: Yes.

MR. IDEMAN: All right, fine.

THE WITNESS: Inside the envelope I find a plastic bag.

Q BY MR. IDEMAN: All right.

A And my initials are on it, as well as the initial "P".

Q It contains a green leafy substance, does it?

A It does.

Q That is the plastic bag that Mr. Porter sold you on January 10th, is it?

A Yes, it is.

Q How much did you pay him for that?

A I paid him \$5.00.

Q Did he set the price, or did you? [67]

A He did.

Q Was that the last contact that you had with Mr. Porter on that day?

A Yes, it was that day.

Q When did you next talk to Mr. Porter?

A I believe it was the 18th or the 19th of January.

Q Where did you speak to him?

A I called him at his home, and I wanted to make arrangements for further purchases of narcotics.

Q From him?

A Yes, I wanted to purchase further narcotics from him.

At the time he indicated to me that he—

MR. COONEY: I object to what he indicated.

What he indicated, your Honor, this is obviously hearsay.

Q BY MR. IDEMAN: Tell us what he said, Officer.

THE COURT: Let me ask both of you this.

Is there any impediment; that is, in the testimony of this conversation with Mr. Porter, who is one of our complaining witnesses? Is there any impediment to this witness testifying to a conversation with Porter?

MR. COONEY: Pardon?

THE COURT: Is there any legal reason? [68]

MR. COONEY: Sure, it is hearsay. This man was not present. It is offered for the truth of the matter asserted, I assume.

MR. IDEMAN: Let me speak to counsel a moment, your Honor.

(Conference between counsel.)

Q BY MR. IDEMAN: Did you ever identify yourself as a police officer to Mr. Porter?

A I did not.

Q While you were working undercover, did Mr. Porter take you to meet anybody, or did you go together to meet someone?

A Yes, on the 20th. He did not take me, but—

Q Of January?

A That's correct.

Q 1967?

A That's correct.

Q Did you meet Porter somewhere?

A Yes, sir, I did.

Q Where did you meet him?

A I met him at Gus' Hot Dog Stand on Vanowen.

Q Was this by pre-arrangement or accidental?

A Yes, by pre-arrangement.

Q Was there somebody else there at that time?

A Yes, the defendant, Mr. Green. [69]

Q Did you talk to defendant Green?

A I did.

Q You were still acting as an undercover officer?

A That's correct.

Q Did you talk about narcotics?

A Yes, sir, we did.

Q What was the conversation as it pertained to narcotics?

A Earlier that day on the 20th, I had a conversation over the telephone with defendant Green.

Q How did you know it was Mr. Green that you talked to on the telephone? Did you recognize his voice somehow?

A I did. He stated he was John, merely John, and that—

THE COURT: Merely John?

THE WITNESS: He merely stated that his name was John, and I said, "John who?" and he said, "Well, I'm the man that has the stuff, and you're the man that wants to buy it," and I said, "Yes," therefore we had arranged to meet each other at Gus' Hot Dog Stand on Vanowen at 9:30 P.M. on the 20th. And I did go to this location on that date at 9:30, and I did meet John Green at that time.

Q BY MR. IDEMAN: Wait a minute; where were [70] you when you had this telephone conversation with the defendant?

A I was at the Van Nuys Police Department.

Q So, was it you that placed the call?

A Yes.

Q What number did you call?

A I had called Melvin Porter.

I wished to purchase narcotics, I told him, and he, Melvin Porter, told me that he would get hold of John.

Q But then you got a telephone call from someone.

A Yes, I received a telephone call from John Green.

Q A telephone call?

A I did.

Q At the police station?

A I did.

Q How did you identify yourself to John, by the way, on the phone?

A As Ray.

Q All right, go on with the telephone conversation.

A Well, on this telephone conversation between myself and John Green, we had made arrangements that on the 20th day of January, to meet at Gus', and I [71] asked him the prices of kilo of marijuana, as well as LSD, and he said that he didn't wish to discuss it over the phone; that he wanted to see me and talk it over; and that he would meet me at Gus'.

Q I take it that this telephone line that you received the call on doesn't go through the switchboard?

A That's correct.

Q It's a direct line, I assume?

A That's correct.

Q Go on; so what did you do then?

A Well, I did meet the defendant at Gus' at 9:30 on the 20th day of January.

Q Just the two of you?

A Yes, Melvin Porter was there. He was employed as a clean-up man there at this hot dog stand.

I waited for the defendant at this hot dog stand, and he did show up, and I asked, "Are you John?" and he stated he was.

I said, "Let's go outside and talk."

We went outside of the hot dog stand. I then inquired as to how much a kilo of marijuana—he would sell it to me for.

THE COURT: This is the defendant that you are talking to?

THE WITNESS: That's correct. [72]

Q BY MR. IDEMAN: What did he say?

A He said for \$500 he would give me five kilos of marijuana and eight caps of LSD.

During this conversation he handed me a—

MR. COONEY: Your Honor, at this time I object to this testimony as the conversation has nothing to do—it is an attempt to show a subsequent employer had act on the part of the defendant. It has nothing to do with the charge before the Court that he gave or sold or transferred to Melvin Porter some marijuana between the 1st and the 10th of January. It has nothing to do with any offense which occurred on the 20th day of January, or if an offense did occur that day.

MR. IDEMAN: Clearly, your Honor, it bears on the essential issue of this case, which is identity, your Honor.

Somebody gave Melvin Porter a bag of marijuana, which he sold to the officer, and the testimony of the

officer now shows who the dealer was, and the evidence of other acts, whether prior or subsequent to the one charged, are admissible if they tend to prove any matters in issue, and this tends to prove identity, who the dealer is that is supplying this marijuana.

MR. COONEY: It certainly does not identify Mr. Green as having been the person who gave or transferred that 29 Baggies of marijuana to Porter two or three weeks [73] before.

THE COURT: I think the only purpose for which this can be considered is to show some relationship. In other words, as I understand this witness' testimony, he asked Melvin Porter to put him in touch with somebody. He wanted to get some more narcotics, and Melvin says, "Well, I'll put you in touch with somebody who can supply your needs."

I think it is for the limited purpose of showing that Porter and the defendant had previous associations and were acquainted. For that limited purpose it is admissible; not to prove a purchase or sale, if one in fact did occur on the 20th day of January.

MR. IDEMAN: Oh, no, that is not offered for that purpose.

THE COURT: For the limited purpose of showing associations.

Q BY MR. IDEMAN: All right. Would you go on with the conversation you had with the defendant.

A The defendant handed me a coke at this time. He asked me if I smoked marijuana, and I told him that I had smoked it; that I usually don't smoke it; that I dealt in narcotics; that I was a narcotic user, and he then asked me if I took LSD, and I told him, "No," and he handed me this coke.

THE COURT: Coke, is that what I understood you [74] to say?

THE WITNESS: Yes, Coca-Cola.

THE COURT: In a bottle or—

THE WITNESS: In a container, in a cup.

He then handed it to me and said, "Here, if you want to deal with me, you are going to have to take a drink of this. It has an acid in it," referring to LSD, and I did notice that there was a powdery substance floating on the top of the Coca-Cola container.

I told him that I did not wish to take any because I was afraid with the quantity of money I had on me, the \$500 which I had shown to him; that I might be robbed, and I was afraid that he might rob me or his friends; therefore, I didn't want to take any narcotics. I merely wanted to make our transaction, and he told me that he didn't deal with anybody unless they took some narcotics with him.

He says, "There are too many undercover officers, and for all I know, you're one," and he said, "You come with me and we will smoke some marijuana, and then I'll give you all the marijuana or whatever you want the following day," and I did not agree.

I showed him the money.

I says, "If you want to deal, you bring the stuff," and he says, "Well, you give me the money."

I said, "No, we'll have to go hand in hand." [75]

I said, "You hand me the narcotics, and I will hand you the money," so we did not come to an agreement, and I left.

MR. IDEMAN: That's all.

Cross examine.

CROSS EXAMINATION

BY MR. COONEY:

Q Officer, when you had this conversation with Mr. Green, was Mr. Porter nearby?

A He was inside the hot dog stand.

Q And you were standing outside?

A That's correct.

Q And this hot dog stand has an open serving area where they serve from the outside—from the inside to the outside; is that correct?

A Yes, there are windows.

Q Now, did Mr. Green tell you that there was some marijuana underneath a car nearby?

A He told me, "If you want to do business with me—" would I agree upon—he said, "For instance, that station wagon there, if I put the marijuana underneath there and told you where it was at, would you go pick it up?" and I says, "No."

I says, "How do I know but what there is something else in there other than marijuana? You will [76] have to hand it to me."

He says, "I'm not going to hand it to you hand in hand."

Q Did you go over to the station wagon?

A No, I did not.

Q Did you take some steps towards the station wagon?

A No, I did not. He was merely using it as an example.

MR. COONEY: I have nothing further, your Honor.

MR. IDEMAN: That's all.

THE COURT: All right, what about this witness? Is he excused?

MR. IDEMAN: As far as the People are concerned, yes.

MR. COONEY: I have no need for him, your Honor.

THE COURT: All right, you can get your car off the street now, Officer.

MR. IDEMAN: Oh, let's say for the record, that he is excused subject to recall.

THE COURT: All right, you are excused, Officer, subject to recall.

THE WITNESS: Thank you.

MR. IDEMAN: Oh, I have one other question.

Officer, is that the carton—that was the carton in which it was contained when you bought this [77] Exhibit 1, the plastic covering?

THE WITNESS: Yes, this is the one. It has my initials on it.

MR. IDEMAN: Your Honor, I have a certification—

MR. COONEY: We will stipulate to that.

MR. IDEMAN: Fine; may it be stipulated that—How old is he?

MR. COONEY: Twenty-five.

MR. IDEMAN: May it be stipulated, counsel, that the birth date of this defendant is January 26, 1942?

MR. COONEY: So stipulated.

THE COURT: January 26, 1942?

MR. IDEMAN: Yes.

People rest, your Honor.

THE COURT: What is your—what age would that make it, then, at the time of the alleged offense?

MR. IDEMAN: Twenty-four.

THE COURT: All right. Prosecution rests?

MR. IDEMAN: Yes, your Honor.

THE COURT: All right, Mr. Cooney.

MR. COONEY: I would like to recall for further cross examination, Mr. Porter, your Honor.

THE COURT: Mr. Porter?

MR. COONEY: Yes. [78]

DEFENSE

MELVIN JOHN PORTER,

a witness called by and on behalf of the People, having been previously duly sworn, was recalled and testified further as follows:

THE CLERK: State your name again for the record, please.

THE WITNESS: Melvin John Porter.

FURTHER CROSS EXAMINATION

BY MR. COONEY:

Q Mr. Porter, directing your attention to People's 1st in evidence here, I show you what appears to be a large plastic bag with white printing along the side and some red initials and some black initials on it.

Contained in this plastic bag is some green leafy material. Have you seen this bag or these contents before, to the best of your recollection?

A. The grass? Yes, I think so; I mean, it is probably grass, yeah.

Q You have seen something similar to the green leafy substance?

A Yes.

Q How about this particular bag? [79]

A No, the bags that I had didn't have any writing on them at all.

Q Didn't have any writing on them?

A No.

Q How about—did it have this white printing along the border?

A Not to my knowledge, no.

Q Were the bags that you—was the bag that you sold to Officer Dominguez, did it contain more green leafy substance than appears to be in this bag?

A I couldn't remember, you know, about how much. I just sold to him as a half a can.

Q The bag that you sold to Officer Dominguez, did it have a little flap to tuck under the top part of the plastic bag?

A No, it was a large bag like that (indicating).

Q A large bag like this, but it didn't have the white printing on it?

A No, not to my knowledge, it didn't.

THE COURT: Can we identify this white printing for the record?

MR. COONEY: That is running parallel to one side, yes.

"Warning. This is not a toy. To avoid dangerous suffocation, keep this plastic bag away from babies and children. Don't use in cribs, beds, carriages [80] or play pens. J.K."

THE COURT: All right, counsel stipulate that that was the printed wording on this bag as read by counsel?

MR. IDEMAN: I will take his word for it.

Q BY MR. COONEY: Now, Mr. Porter, approximately on January 20, 1967, did you—

THE COURT: I'm sorry, counsel, I can't hear you.

Q BY MR. COONEY: Approximately January 20, 1967, did you arrange a meeting between Officer Dominguez and Mr. John Green?

A I don't know the day, but I did arrange a meeting for them.

Q Did you arrange a meeting between these two because you wanted Mr. Green to find out whether or not Officer Dominguez was a police officer?

A Well, at the time I was pretty sure he was, but I was not positive, but the main thing was John wanted to sell him \$500 worth of either peat moss, if he wanted grass, or baking soda if he wanted acid.

THE COURT: Miss Reporter, read back that answer, please.

(Answer read by the reporter.)

Q BY MR. COONEY: Well, now, you told—did you tell Mr. Green that you thought this Mr. Dominguez, Ray Dominguez, was a police officer? [81]

A Yes, I did.

Q You told him that?

A Yes.

Q This is before the meeting that he had?

A Yes, sir.

Q Did you ask Mr. Green to find out or find out whether or not he was a police officer?

A I might have. I couldn't be positive.

Q Now, you remember testifying at the preliminary hearing in Van Nuys, don't you?

A Yeah.

Q Do you remember testifying as follows—

MR. COONEY: Counsel, page 16, line 26.

Q BY MR. COONEY: (Reading)

“Q After you picked up the shopping bag in the back yard of John Green's parents' house, what did you do with it?

“A Took it over to my house.

"Q Now, was anybody with you at the time you picked this up?

"A Yes, sir, there was Bob Smutz.

"Q Bob Smith?

"A Bob Smutz."

Now, do you remember testifying to that?

A Yes, I am pretty sure I said that, yeah.

Q Do you remember making a statement to the [82] police officer sitting here on my right—

I'm sorry; your name?

OFFICER WADE: Officer Wade.

Q BY MR. COONEY: —Officer Wade, on January 31, 1967?

A Well, what do you mean by a statement?

Q Did you make a statement to him about getting marijuana or buying marijuana or selling marijuana?

A Yes, I did.

Q Do you recall what you told him at that time?

A Um-hmm. Let's see.

Well, it had to do with buying it from John, yes, sir.

I mean, I couldn't say exactly what went on or not.

Q Well, do you remember telling the officer that Mr. Green phoned you up and told you that he, Mr. Green, had some marijuana and wanted to bring it over and leave it at your house?

A I might have said that, yeah.

Q Do you remember telling him that Mr. John Green had brought the marijuana over to your house that day, the day that you had the conversation with Mr. Green?

A I think—let's see. [83]

Yes, I think so.

Q Now, at the time that you made this statement to the officer, did you believe that you were telling the truth?

A Yes, sir.

Q At the time that you testified under oath in Van Nuys at the preliminary hearing, did you believe you were telling the truth?

A Yes, sir.

Q And at the time you testified today here in court, did you believe that you have told the truth?

A Yes, sir.

Q Now, at the time that Mr. Green had this meeting with Officer Dominguez, this was at Gus' Hot Dog Stand; is that correct?

A Yes, sir, Gus' Drive-In and Grill.

Q And you were standing nearby, were you not, when they had this meeting?

A Well, I was working, and I was sweeping up the patio.

Q Did you overhear bits of their conversation?

A No, I don't think so.

Q You heard them talking, but you don't recall what they said?

A No, they were outside, and I was inside.

Q Oh, you were inside? [84]

A Yeah.

Q You were inside, and you never went outside?

A No, well, the patio is inside, you know.

Q In January of 1967, did you ever make a statement to Mr. Blackmore in substance stating that you were going to get even with John Green because he had re-possessioned your automobile?

A Well, I told him I was mad about it because I just had a little more time till my next pay check to

come, and then I could have paid off what I owed him.

Q Was this before or after you were arrested?

A Well, I—he said I had to give him the pink slip the night that I was arrested.

Q How many of these Baggies did you say were stolen from your house?

A I don't know. I mean, I sold about six, seven,—oh, maybe eight of them, and the rest—and take away one. I think the rest of them were stolen. About that many, I don't know.

MR. COONEY: Nothing further, your Honor.

REDIRECT EXAMINATION

BY MR. IDEMAN:

Q Melvin, you say that you suspected Officer Dominguez was a police officer? [85]

A Yes.

Q And he wanted to buy \$500 worth of narcotics; is that correct?

A Yeah.

Q And you didn't have that much narcotics to sell to him; is that correct?

A No.

Q So you sent him to the defendant because you felt that he would have that amount to sell him; right?

A Well, John was never going to sell him anything because I just told John that night that I just sold some stuff to a narcotic officer.

This was about a day or so after, and then he insisted, or it was his suggestion that, "If he calls back, why don't you tell him—tell him to call me, and that we will sell him \$500 worth of something else," and later I found out it would probably be peat moss or baking soda.

Q Isn't it true that the defendant brought marijuana to your house on many different occasions?

A He brought it on a couple of occasions.

MR. COONEY: Your Honor, I move to strike that answer unless this is being offered for a limited purpose.

THE COURT: What is this offered for?

MR. IDEMAN: Of showing identity. That is the principal reason; that it is showing identity. [86]

MR. COONEY: Identity of what?

MR. IDEMAN: Identity of the person who furnished that marijuana between the 1st day of January and the 10th day of January.

MR. COONEY: Your Honor, I don't care if this man has delivered marijuana to his house fifty different times. That is not the charge.

The charge is, did he give the marijuana to this boy on this date that he is charged with.

THE COURT: I agree with that, but now this is a trait in issue or is this a—

MR. IDEMAN: It is not trait your Honor. It is another act offered to show the factor material to the People's case, which is identity.

Other acts that are sufficiently similar in nature can be shown and proved to prove identity. The fact that a man furnishes narcotics to a particular minor on one occasion has certainly strong probative value that he may be the one that furnished that narcotic on another occasion.

THE COURT: What is your authority?

MR. IDEMAN: I will be happy to submit authority to the Court. This is—

THE COURT: All right, I would like you to.

As I say, unless this is like the case of a man who committed ten other burglaries and in the same [87] fashion, I can't see the admissibility of another transaction unless it is alleged as being admissible to prove this particular transaction; and as I say, I don't see a trait issue, or I don't see some—I will be glad to have your authority. I will reserve my ruling on it to a later time.

It appears that we are going to have a jury that is coming in on another matter.

How many more witnesses have you?

MR. COONEY: My witnesses are very short, your Honor; not in stature, but testimony. I would say probably—

MR. IDEMAN: Excuse me, your Honor, but I would like to get this particular testimony from this witness now subject to a motion to strike if your Honor is not satisfied with my authority before he leaves tonight.

THE COURT: Well, I will accept it subject to a motion to strike, and I am inclined to believe—unless you have some good authority, I will not allow it to stand. The burden is on you to get the authority tomorrow.

MR. IDEMAN: All right.

Q BY MR. IDEMAN: Now, these couple of other times, when the defendant furnished narcotics to you or marijuana to you, when was that?

A Well, I wouldn't know the dates. [88]

Q Approximately when?

A Well, I don't know. This is maybe sometime between—let's see—oh, let's see, it was in the short time that I was using it.

Q Pardon?

A It was in the time that I was using it.

Q That was a period of how long?

A About two months before I was arrested.

Q So, in a period of approximately—well, did he furnish to you before Christmas of last year?

A Yeah.

Q Did he give you some after Christmas?

A Yeah, I think. I don't know—I mean, I don't know. I don't keep a calendar of the exact date.

Q Well, could it have been after the first of the year that he gave you some?

A He might have. He might have not. I couldn't say for sure.

Q On the two occasions how much did he give you on each of those occasions?

A Just a couple of joints.

Q Did he give you enough to sell?

A No.

Q Did you sell it?

A No, I just—they were just about—well, I think. I got six cigarettes from him before. [89]

Q You smoked them yourself?

A Yeah.

Q They were marijuana cigarettes?

A Yes, I guess so.

Q It made you feel like the other cigarettes that you had smoked that were like marijuana, right?

A In a sense, yes.

Q Now, counsel asked you a question about your being angry with the defendant about something about a car.

A Yeah.

Q Did you tell somebody you were going to get even with him for—

A Well, I just told Rusty I was real mad because I only had a few more days till I was to get paid.

Q When did you make that statement?

A It was—John called me up that day.

Q What day?

A The day I got arrested, and the day I gave him the pink slip. He said he wanted the car back and—

Q Melvin, the question is when did you make the statement to this other fellow?

A Same day.

Q What is his name?

A Rusty Blackmore.

Q Rusty Blackmore? [90]

A Uh-huh.

Q Did you say you were going to get even with him?

A I don't—I said I was really mad about it.

I might have said it; I don't know. I couldn't say—I mean, I don't remember.

Q When were you released from custody? How long did you spend in jail?

A I was—how long was I in jail?

Q Yes.

A Just about 21 days. I got out on the 16th.

Q You got out of jail sometime in February?

A Uh-huh, February 16th.

Q At the time of the preliminary hearing on February 8th, were you in custody at that time?

A Yeah.

Q And you got out about a week or so after that?

A Yes, eight days.

Q Has anybody talked to you about this case since you got out of custody?

A No.

Q Has the defendant talked to you?

A No, that's one of my things on probation. [91]

You see, I'm not supposed to associate with him.

Q Has he talked to you about the case, or has he talked to you at all?

A No.

Q Has anyone else talked to you?

A No, not about the case. I mean, Rusty—those guys are all friends of mine. I talk to them all the time, but not about this case.

Q Some of the defendant's witnesses, have you talked to them?

A Yes, but not about the case.

Q You have never mentioned the case to them?

A No, I didn't know they would be involved in it.

Q Have you talked to the defendant's attorney, Mr. Cooney?

A No.

Q Except in court, naturally?

A Yes, today.

Q Now, Melvin, you state that you took—were you high on LSD the day that you got the marijuana that we are talking about?

A Yeah.

Q Where did you get that LSD?

A From a guy down at the Topanga Plaza. [92]

Q Where?

A The guy that's down at the Topanga Plaza.

Q What's his name?

A Lug Head, or something like that. He's always goofed up.

Q Pardon?

A Well, you know, he over-dosed on it once, and he is mentally weird now. That's why we call him Lug Head, I guess.

Q Do you know his full name?

A No.

Q Do you know where he lives?

A No, I just know that he's down at the Topanga Plaza quite often.

MR. IDEMAN: That is all I have of this witness, your Honor.

MR. COONEY: Nothing further, your Honor.

THE COURT: All right, counsel, what is your pleasure? Do you want to go ahead?

First, we will have to bring this jury in and discharge them.

MR. IDEMAN: I would like to have Mr. Porter ordered back for tomorrow anyway; so you can have him tomorrow.

THE COURT: I have to rule on this objection yet, and you're to get some authorities. I will not be able [93] to finish with him in any event.

MR. COONEY: Well, I am sure that he is not going to be able to find it.

I have a couple of short witnesses, if your Honor please. Not by stature, but their testimony will be brief. If we can put them on now, then it will leave only the defendant for tomorrow.

THE COURT: Is that agreeable with counsel?

MR. IDEMAN: Yes, your Honor.

THE COURT: Well, let's excuse him now, and will you be able to get him back tomorrow?

MR. IDEMAN: Yes, if your Honor would order him back.

THE COURT: All right.

Mr. Melvin Porter, without further notice or order of the Court you are to return here at 10:00 o'clock tomorrow morning.

Well, let's see—can you be here at 9:30?

MR. COONEY: Yes, I will be here.

MR. IDEMAN: Yes.

THE COURT: You don't have any calendar to answer anywhere that will keep you until 11:00 o'clock?

MR. IDEMAN: No, your Honor.

THE COURT: All right. Mr. Porter, then you will return here without further notice or order at [94] 9:30 tomorrow morning.

THE WITNESS: Yes.

THE COURT: Don't take any LSD tonight before you get back here in the morning.

THE WITNESS: Okay.

THE COURT: Return here sober. All right, you will be excused, and you will be back here at 9:30.

(Proceedings had on unrelated matter.)

THE COURT: All right. Back to People versus John Anthony Green.

Are there some witnesses you wanted to call?

MR. COONEY: Yes, your Honor. I have three very short witnesses.

Defense will call Mr. Blackmore first.

DANIEL BLACKMORE,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated and state your name, please.

THE WITNESS: Daniel Blackmore.

THE CLERK: Spell the last name, please.

THE WITNESS: B-l-a-c-k-m-o-r-e. [95]

DIRECT EXAMINATION

BY MR. COONEY:

Q Mr. Blackmore, are you acquainted with Mr. Melvin Porter?

A Yes, uh-huh.

Q Were you also acquainted with Mr. John Green?

A Yes, sir.

Q Now, directing your attention to the month of January of 1967, did you have a conversation with Mr. Porter relative to Mr. Green's repossessing an automobile which had been sold to Mr. Porter?

A Yes, I did.

Q What did Mr. Porter tell you?

A Well, he was mad because John couldn't make it, so he took back the car. He said he was going to get back at him.

Q He said he was going to get back at Mr. Green?

A Yes.

Q Then subsequently Mr. Porter was arrested; is that correct?

A Yes.

Q Are you acquainted with Mr. Porter's reputation in the community wherein he lives and goes to school with respect to the character traits of truth, [96] honesty, and integrity?

A It is not real good. It is very bad.

Q You are acquainted with it?

A Yes.

Q What is it?

A It is bad.

MR. COONEY: Nothing further, your Honor.

MR. IDEMAN: I have no questions.

THE COURT: All right, you may be excused, then, Mr. Blackmore.

Mr. Blackmore, you are excused from further attendance by both counsel. You may return to school or wherever you go, and you won't have to return tomorrow.

THE WITNESS: Thank you.

MR. COONEY: We will call Mr. Smutz as our next witness.

ROBERT SMUTZ,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated and state your name, please.

THE WITNESS: Robert Smutz.

THE CLERK: Will you spell the last name, please.

THE WITNESS: S-m-u-t-z. [97]

DIRECT EXAMINATION

BY MR. COONEY:

Q Mr. Smutz, are you acquainted with Mr. Melvin Porter?

A Yes, I am.

Q Do you know where John Green's parents reside?

A I do now.

Q Now, directing your attention to a period of time between the 1st day of January of this year and the 10th day of January of this year, did you at any time accompany Mr. Porter from his house over to the house of Mr. Green's parents?

A No.

MR. COONEY: I have no further questions of this witness.

MR. IDEMAN: No questions.

THE COURT: All right, is this witness excused?

MR. COONEY: Yes.

THE COURT: All right, Mr. Smutz, you go back to your work. You are excused from further attendance.

THE WITNESS: All right.

MR. COONEY: Would you tell Mr. Davis to come in.

THE WITNESS: Yeah. [98]

HARRY LANIER DAVIS,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated and state your name, please.

THE WITNESS: Harry Lanier Davis.

THE CLERK: Spell the last name, please.

THE WITNESS: D-a-v-i-s.

THE CLERK: Spell the middle name, too, please.

THE WITNESS: L-a-n-i-e-r.

DIRECT EXAMINATION

BY MR. COONEY:

Q Mr. Davis, are you acquainted with Melvin Porter?

A Yes, I am.

Q Are you familiar with his reputation in the area wherein he lives and goes to school, with respect to his character traits of truth, honesty and integrity?

A Yes, I am.

Q What is that reputation?

A Not very good.

MR. COONEY: Nothing further, your Honor.

MR. IDEMAN: No questions. [99]

Los Angeles, California

Thursday, April 6, 1967

9:30 A.M.

THE COURT: People versus John Anthony Green.

MR. COONEY: Yes, your Honor, defendant is present with counsel and ready to proceed.

MR. IDEMAN: People are ready.

THE COURT: All right, do you want to educate counsel and the Court with your authority?

MR. IDEMAN: Yes, your Honor. The matter we discussed yesterday, the matter of other acts by the defendant of furnishing marijuana to the same minor on other dates not charged, I found a case that is on all fours and supports the People's position.

This is People vs. Sykes, 44 Cal 2d at page 166, headnote 6, which is discussed—

THE COURT: What are the facts and the ruling?

MR. IDEMAN: —on page 170. This was a defendant who was prosecuted for furnishing marijuana to a minor girl, and he was charged with furnishing her with cigarettes which she smoked on one particular date, and she was also permitted to testify that the defendant furnished her with the marijuana cigarettes on another date.

THE COURT: Though he was not charged with supplying on another date? [102]

MR. IDEMAN: Not charged on another date.

First, the Court said that no objection was made to it; so they couldn't raise it on appeal, but they went on to discuss, "Moreover—" this is footnote 6, reading on page 170.

"Moreover in cases based upon the commission of certain types of crimes, evidence of similar conduct of the defendant with the same person

who is named in the Information or Indictment quote, is admissible to show the disposition of the defendant to connect the act charged and the probability of his having committed it unquote; citing People vs. Jewett, '84 Cal. Ap. 2d pages 276 and 279."

THE COURT: Let's go back here.

So, trait is in issue; that is what it amounts to. I didn't realize that would be considered as trait in issue.

MR. IDEMAN: First, if your Honor please, let me finish.

"This rule has been applied in prostitution, for sex crimes, and upon a charge of pimping. People vs. Bellamy, 79 Cal App 160.

"The reasons for applying that rule [103] where the charge is furnishing narcotics to a minor are just as compelling as in sex cases."

THE COURT: What do you have to say, counsel?

MR. COONEY: Well, I think everybody is agreed here that under the circumstances certain acts of prior misconduct can be shown where it tends to show habit, scheme, or design, or a pattern of conduct.

My only objection yesterday was that here the defendant is charged with the supplying of marijuana or a substance—well, the substance is giving him the 29 Baggies; which is a pound or a kilo or something like that, to sell.

At least one of the stories is that he gave it to him to sell, and a transaction a month or two before where he gave him marijuana cigarettes to smoke, and in one instance he gave him the marijuana in bulk to sell, and in another instance, according to the testimony of the witness, he gave him marijuana to smoke; how-

ever, I will withdraw the objection, your Honor, because it just all boils down to whether or not the Court is going to believe—

THE COURT: Whether or not to believe Porter or the defendant.

MR. COONEY: Yes. If your Honor is going to believe Mr. Porter as to his giving him this marijuana [104] cigarette, then it justifiably could believe Mr. Porter as far as giving him a whole shopping bag full.

THE COURT: Let me go back to this.

What about the other offer of proof that I wouldn't allow, which was made by the prosecution, going into these other acts.

We limited the testimony of this witness, Officer Wade, to only the statements about the offering of the—I mean, about the delivery of the merchandise and so forth on this 10th day of January.

MR. IDEMAN: I believe that evidence should be admitted by the Court, because the evidence is that the defendant has delivered substantial amounts—

THE COURT: What is the offer again? What he had done on prior occasions?

MR. IDEMAN: That was approximately what—with respect to that, that during the preceding five months preceding January 31, 1967, that the defendant brought large quantities of marijuana to the victim's home and gave it to the victim to hold, and on some occasions the victim used some of this and paid the defendant for it, and that the buyers would come to the victim's house and purchase the marijuana from the victim, and he would sell it to them and turn the money over to the defendant—

MR. COONEY: Well, I will stipulate—

MR. IDEMAN: —and that the suspect, the [105] defendant, made, during these five months, deliveries of large quantities of marijuana approximately once a week to the victim's home; and based on People vs. Sykes, this is admissible.

MR. COONEY: I will stipulate that this statement was made by Mr. Porter to this officer on January 31st.

THE COURT: All right.

MR. IDEMAN: May the officer be deemed to so testify?

THE COURT: So stipulated?

MR. COONEY: Yes.

THE COURT: All right, that the officer would so testify?

MR. IDEMAN: Fine; People rest.

MR. COONEY: Yes.

THE COURT: All right, Mr. Cooney.

MR. COONEY: Yes, your Honor.

Mr. Green, take the stand, please.

JOHN ANTHONY GREEN,

the defendant herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

THE CLERK: Take the stand and state your name, please.

THE WITNESS: John Anthony Green. [106]

DIRECT EXAMINATION

BY MR. COONEY:

Q Mr. Green, you are acquainted with Melvin Porter, are you not?

A Yes.

Q How long have you known him, Melvin Porter?

A About five or six years.

Q Did you live in the same neighborhood with him?

A Yes, he lives three doors down the street.

Q Did you also know these other witnesses for the defense who have testified, Mr. Blackmore and Mr. Davis, and Mr. Smutz?

A Yes, I know them.

Q Do they live in the neighborhood, too?

A Mr. Blackmore and Mr. Davis live in the same neighborhood, and Mr. Smutz lives about a mile away.

Q Now, have you ever supplied any marijuana to Mr. Porter on any occasion?

A No, sir.

Q Now, you have heard some testimony—strike that.

Did you, during the year 1966, sell an automobile to Mr. Porter?

A Yes, I did.

Q And at a later date in 1967 did you [107] re-possess that automobile?

A Yes, sir.

Q Was there any reason why you re-possessed the automobile?

A Yes, after six months he failed to pay the total amount of the purchase price.

Q And you took the car back?

A Yes.

Q Now, on January—on or about January 20th did you have a conversation with a Mr. Dominguez?

A Yes, sir, I did.

THE COURT: Is that the officer?

THE WITNESS: Yes.

THE COURT: Who testified here?

Q BY MR. COONEY: Will you tell us how you happened to have a conversation with Mr. Dominguez?

A Well, I called Melvin Porter, and I asked him about the car, and he said he had a problem and that I should come over and talk to him, and he wouldn't tell me what it was over the telephone.

When I went over there, he said that he was pretty sure he had sold some marijuana to a narcotic agent, and he asked me if I would talk to the agent and try and determine whether he actually was a police officer or not; and then he came up with this idea that if he was, to say that he had \$500 worth of marijuana for sale; that [108] John would sell him some peat moss instead of marijuana.

Q Did you contact Officer Dominguez?

A Yes, I did.

Q After you contacted him, did you arrange to meet him some place?

A Yes, John asked to have the meeting at the hot dog stand where he works.

Q When you say "John"—

A John asked me to—

Q Who is John?

A John Porter. That is the name that I usually call him. I guess Melvin is his legal name.

Q Is it Melvin John Porter?

A I guess that is it.

Q Will you say "Mr. Porter," so we won't confuse things here?

A Yes, okay.

Q Okay, Mr. Green, so you arranged to meet Officer Dominguez somewhere?

A Yes.

Q Now, at the time that you arranged to meet him somewhere aside from what Mr. Porter told you as to his suspicions, did you have any knowledge that Mr. Dominguez was a police officer?

A No, I didn't.

Q So you —did you meet Mr. Dominguez that [109] same day at the hot dog stand?

A Yes, later on that night.

Q Was this at a time when Mr. Porter was working there?

A Yes.

Q Pardon?

A Yes, sir.

Q Now, you have heard Officer Dominguez testify as to what the conversation was between you. Is that conversation substantially correct?

A Yes, except for one part.

Q What part is that?

A When I told him that there could be some marijuana underneath that car over there, he took off on a run towards that car, and I called him back and I said that I was only kidding.

Q Did you offer him a Coca-Cola?

A Yes, I did.

Q Did you have anything in the Coca-Cola?

A Yes, I had an aspirin floating on the top.

Q Was there any reason why you were—why you had offered him this Coca-Cola?

A Yes, I was reasonably sure that narcotic agents couldn't consume any narcotics, and that he would turn it down even if he didn't know it was aspirin or did know.

Q Why did you agree to talk to the—why [110] did you do this for Mr. Porter? Any particular reason?

A Well, I always felt sorry for him.

You know, I tried to help him out. Like I gave him the car and told him he could pay me for it later, and he stretched it out to about six months, and I just, you know, tried to do him another favor.

Q Did you, during the five or six years that you have known him—have you had a certain relationship with Mr. Porter?

A Well, he always came down and helped me work out on my cars, and so I felt I owed him something.

Q Did you ever play games or go places with him?

A Well, I used to take all the guys to the beach in the neighborhood, and played football with them in the street.

MR. COONEY: Thank you. I have nothing further.

THE COURT: All right, Mr. Ideman?

MR. IDEMAN: Thank you, your Honor.

CROSS EXAMINATION

BY MR. IDEMAN:

Q Mr. Green, had you ever discussed narcotics with Mr. Porter before the date you talked to Officer Dominguez?

A Yes, I have. [111]

Q Had you ever supplied him with any narcotics?

A No, I haven't.

Q Do you deal in narcotics?

A No, I don't.

Q Did you deal in narcotics at about the time of January, 1967?

A No. [112]

Q Now, how was it that you had discussed narcotics with Mr. Porter before the date that you talked to Officer Dominguez?

A Oh, several different occasions Mr. Porter offered me marijuana cigarettes to smoke.

Q You knew they were marijuana?

A When he said they were marijuana I took his word for it.

Q Had you ever seen marijuana before Porter showed it to you?

A I haven't seen marijuana period. I don't even know what it looks like.

Q Before Porter showed you what he said was a marijuana cigarette, had you ever seen marijuana?

A He showed me a cigarette that was wrapped up, but I didn't see any marijuana inside of it.

Q Well, before that time had you ever seen [128] anything that looked like marijuana?

A No.

Q Were you familiar with the going price for marijuana?

A Well, yes, I guess I was familiar with it.

Q How did you become familiar with the price of marijuana?

A I heard people talk.

Q Who did you hear talk?

A Different—you know, friends and that—

Q What were their names?

A Well, I don't remember offhand.

When you hear somebody say they paid \$10 for such-and-such a thing or whatever it is—

Q Give me the name of one person that you heard talk about it.

A Ralph King.

Q How old is he?

A I don't know; he's over 21.

Q Where does he live?

A I don't know.

Q Do you know what part of the City or County he resides?

A Canoga Park.

Q Do you know his telephone number?

A No. [129]

Q What—where does he live?

A In Canoga Park.

Q Do you know what street?

A No, I don't.

Q Have you been to his house?

A Yes, I have.

Q But you don't remember the street?

A He has moved since then.

Q Does he use marijuana?

A Does he use marijuana?

Q Have you ever seen him use marijuana?

A No, I haven't.

Q How long have you know him?

A Oh, about three years.

Q Did he talk to you about the price of marijuana?

A No, he hasn't.

Q Who did he talk to about the price of marijuana?

A A person I never saw before.

Q When was that date-wise?

A I think it was in 1966 somewhere.

Q Approximately when?

A Oh, in the middle of the year.

Q Last summer?

A It could have been last summer. [130]

Q Was that at King's house?

A No.

Q Where was it?

A It was in back of a bar in Reseda or Tarzana.

Q What were you doing at the bar?

A Visiting a person that owned the place.

Q Was that person Mr. King that you talked to about the price of marijuana?

A No.

Q Were you there with Mr. King?

A No, I wasn't there with Mr. King. He happened to be there at the same time that I was.

Q Mr. King had a conversation with an unknown man about the price of marijuana in back of the bar; is that correct?

A Yes, he was unknown to me.

Q How did you happen to be at that conversation?

A I just happened to be there in the back of the bar by my car.

Q Who else have you ever heard discuss the price of marijuana?

A Do you want the names of all the people?

Q Yes.

A Well, I really don't think there's that [131] many. There might be one or two, just chance things, you know.

Q What are their names? Name one.

A One of them was Jimmy Thompson, across the street.

Q Across the street from where?

A From where this bar is. His father owns a typewriter shop.

Q How many times had you heard Jimmy Thompson discuss the price of marijuana?

A Well, I don't remember whether I ever heard him discuss the price of marijuana or not, but I heard him mention marijuana once as to—

Q To whom was he mentioning that?

A To who? He was talking to himself. He was more or less talking to himself. He said he was going over and smoke some dope.

Q All right. Who else?

A I don't think I ever heard anybody talk about marijuana.

I really don't associate with those kind of people.

Q Why did you—I think counsel asked you, but I would like to ask you again if I may.

Why did you decide—did you think that Mr. Porter had perhaps sold some marijuana to a police [132] officer?

A Yes, that is what he said.

Q You were aware that that is a crime to sell marijuana?

A Oh, yes.

Q No doubt about that in your mind, is there?

A Well, no.

Q All right. Did you know that it is a crime to offer to sell marijuana whether you deliver it or not?

A I'm not very familiar with the marijuana laws at all.

Q Did you think that by offering to sell marijuana and LSD to a police officer that you might get into trouble?

A I didn't see how.

Q You said you did not?

A Well, I have now.

Q You are telling us that you offered to sell \$500 worth of marijuana and LSD to a man that you knew to be a police officer. Is that your testimony, sir?

A No, I didn't offer to sell \$500 worth to a police officer.

Q You offered to sell him marijuana and LSD, didn't you?

A No, I didn't. [133]

Q Mr.—your counsel asked you if the officer's testimony—

A I was asking that for John.

Q I beg your pardon?

A I said I was asking for John.

Q Yes. But you did have a conversation with the officer in which you said that you would sell him marijuana and LSD, didn't you?

A Oh, yes, yes.

Q It is your testimony that you suspected and had good reason to believe that this was a police officer that you were selling this to, didn't you?

A Well, I had a good indication of that from John's word only. I couldn't tell just by looking at the guy.

Q But you didn't feel that you could get into trouble by doing this?

A Well, if I didn't sell him anything, or just talking to a person.

Q You didn't know that it was equally against the law to offer to sell as well as to sell?

A No, I didn't.

Q Did you tell him that you would sell to him on the condition that he would—that he would fix with you?

A Fix? [134]

Q Well, did you say take some LSD or marijuana with you? Did you tell him that?

A I asked him if he cared to smoke marijuana with me.

Q Why did you ask him that?

A Well, I already told you. I didn't think at the time that a narcotic agent could take any dope or use dope.

Q That was the way that you were going to find out whether he was in fact an officer; right?

A Well, I thought it was pretty good.

Q All right. Suppose he said, "Yes, I'll take some." What would you have done then?

A I don't know, because I didn't have anything there.

Q Where did you have it?

A I didn't have anything anywhere.

Q Did you offer to sell five kilos?

A I think I did mention something about that.

Q Where did you learn the term "kilo" regarding marijuana traffic?

A I had this book that I had read that Mr. Porter gave me.

Q What book?

A It's called "Nightmare Drugs." [135]

* * *

THE COURT: Now, let's go back to Porter.

After he watched you and helped you casually with your automobile, when did you first hear him discuss the matter of marijuana?

THE WITNESS: I happened to be over at his house, and he mentioned the fact that he started smoking marijuana.

THE COURT: When was that, Mr. Green, approximately?

THE WITNESS: It was in 1966 sometime.

THE COURT: What time in 1966?

THE WITNESS: I think during the summer of 1966.

THE COURT: That made him then about 16?

THE WITNESS: Yes, sir.

THE COURT: What did he tell you about it?

THE WITNESS: He just said that he started smoking marijuana, and I asked him, "What for?" and he just said, you know, "Just for kicks and to get high."

THE COURT: Did you ask him where he got it?

THE WITNESS: No, I didn't, sir.

THE COURT: All right. What was the next [147] conversation you had with him since that summertime about the subject of marijuana?

THE WITNESS: I don't think I ever had another conversation with him about marijuana.

I just told him right then and there I didn't want to hear any more about that stuff.

THE COURT: Did you ever have any conversation about LSD?

THE WITNESS: No, sir.

THE COURT: How many times—did Porter ever smoke marijuana in your presence?

THE WITNESS: He never has, sir.

THE COURT: Did he ever tell you where he got his marijuana?

THE WITNESS: No, sir.

THE COURT: Did you ever ask him where he got it?

THE WITNESS: No, sir.

THE COURT: At no time did you ever discuss LSD with him?

THE WITNESS: No, sir.

THE COURT: Did you return Porter's down payment he made of the car that you re-possessed?

THE WITNESS: No, sir.

THE COURT: When did you get the book about "Nightmare Drugs" from Mr. Porter?

THE WITNESS: In December. [148]

THE COURT: Of 1966?

THE WITNESS: Yes, sir.

THE COURT: When did Mr. Porter call you and tell you of his involvement with the sale of marijuana to the police officer?

THE WITNESS: I think it was in the middle of January.

THE COURT: Of 1967?

THE WITNESS: Yes.

THE COURT: Did he call you on the phone?

THE WITNESS: By phone, sir.

THE COURT: Where?

THE WITNESS: 6933 Cozycroft.

THE COURT: Did you have a telephone there?

THE WITNESS: Yes, sir.

THE COURT: Did he call you by phone?

THE WITNESS: Yes.

Well, he didn't tell me about the involvement over the phone. He just said he had a problem.

THE COURT: What did you tell him?

THE WITNESS: I asked him what it was, and he wouldn't say anything over the phone.

THE COURT: And what was the balance of your conversation?

THE WITNESS: He suggested that I come over there, and I asked what for, and he said, "So I can talk [149] to you," so I went over there.

THE COURT: You went to his residence on Bassett Street?

THE WITNESS: Yes.

THE COURT: And you had a conversation with him there?

THE WITNESS: Yes, sir.

THE COURT: And anybody else present besides yourself and Mr. Porter?

THE WITNESS: No, sir.

THE COURT: When did this conversation take place at his residence?

THE WITNESS: It was in the afternoon.

THE COURT: Of what day?

THE WITNESS: The same day that he called, sir.

THE COURT: What day was that?

THE WITNESS: It was somewhere in the middle of January closer to the first—between the 10th and the 15th, I think.

THE COURT: Sometime between the 10th and the 15th approximately?

THE WITNESS: I think so, sir.

THE COURT: Tell us, now, what the substance of

the conversation was that you had with Mr. Porter at Porter's residence the day that he had called you to his home, and you then went to his house between the 10th and [150] the 15th of January.

THE WITNESS: He mentioned the fact that a man came over to his house with another person, and that he sold some marijuana to him, and that he suspected that he was a narcotics agent, and he asked me what I thought he should do, and I said I didn't know, and then he asked me if I would talk to the man and try and determine whether or not he was a narcotic agent.

He also suggested that if he was that, or if I thought he was, or if he was, or maybe I could somehow give him \$500 worth of peat moss.

THE COURT: What do you mean by peat moss?

THE WITNESS: I guess he had a bale of some peat moss, and he was going to sell him the peat moss.

THE COURT: Is that a slang expression for marijuana?

THE WITNESS: I don't think so, sir. I think he had peat moss actually in mind.

THE COURT: What else besides peat moss was he going to sell him?

THE WITNESS: He had intentions of—if he wanted some LSD, he was going to give him baking soda.

THE COURT: And tell us about any other conversations you had then on this day after he called you at your apartment.

THE WITNESS: He gave me Ray's phone number. [151]

THE COURT: Pardon?

THE WITNESS: He gave me Ray's phone number. We also—he had already told Ray that he knew some guy named John. In fact, he didn't ask me before he told me. He just went ahead and said—and assumed that I would go through with this thing.

THE COURT: And what else was said then on this occasion that you met Mr. Porter at his residence?

THE WITNESS: He suggested that the hot dog stand would be a good place to set up a meeting so he could see what was going on.

THE COURT: That is the place where Mr. Porter worked?

THE WITNESS: Yes, sir.

THE COURT: What else was said on this occasion at Porter's residence?

THE WITNESS: I asked him about the car, and he still said that he hadn't money; that he was waiting for his next check or something.

THE COURT: How much had he paid on the car?

THE WITNESS: Twenty dollars.

THE COURT: Of the \$85 purchase price?

THE WITNESS: Yes, sir.

THE COURT: Any other conversation at this time at the Porter house?

THE WITNESS: That is about it, sir. [152]

THE COURT: Now, when you agreed to meet with this Ray, was that the name that was given?

THE WITNESS: Yes, sir.

THE COURT: At the hot dog stand?

THE WITNESS: Yes, he already gave me Ray's telephone number while I was over there, too.

THE COURT: Mr. Green, you told us that when you first learned that Mr. Porter mentioned the subject of marijuana to you, you told him you didn't want to hear anything about it; is that correct?

THE WITNESS: Yes.

THE COURT: What did you tell him when he mentioned the subject of marijuana and the negotiations with this man Ray when you had come over there to his house this date between the 10th and the 15th of January?

THE WITNESS: Well, I really didn't say anything, sir. I just looked at him. I didn't know what to say.

THE COURT: You didn't tell him that you didn't want to have any involvement during the discussion of the marijuana?

THE WITNESS: Well, I didn't say anything at all.

I just, you know, I just looked at him, and he kept saying, "Well, what should I do? What should I do?"

THE COURT: And what did you say; that you would like to help him as an old buddy and get involved in [153] marijuana, though you didn't like it when he first mentioned it to you in the summer of 1966?

THE WITNESS: No, I said, "I don't know what you are going to do," and that is when he came up with the idea of finding out whether he was really a narcotic officer or not. [154]

* * *

Q After this meeting that you had with Mr. Porter at his home, did you or Mr. Porter call the [157] man identified as Ray?

A I did, sir.

Q What was your conversation with Ray on the telephone?

A I told him I was a friend of John's, and he asked me what my last name was, and I said that there was no reason why you should have to know my last name, and he said he was interested in buying some marijuana, and I asked him if he wanted to talk to me in person, and he said, yes, and I suggested that we meet at the hot dog stand where John worked, and we agreed upon a time, and that was all.

Q How did you identify him or he identify you at your get-together at the hot dog stand?

A I just told him I would have a green jacket on.

Q Did you tell him what kind of a car you would be driving?

A No, sir.

Q Was Mr. Porter to introduce you?

A No. /

Q Did you arrive at the appointed hour in a green jacket?

A Yes, sir.

Q When did you concoct the idea of the acid test on this man? [158]

A That was after I made the telephone call.

Q And when did you secure the aspirin or whatever the substance was that you had in this Coca-Cola? When was that prepared?

A Well, I just went to the store and got some aspirin.

Q And when did you get the Coca-Cola?

A At the hot dog stand.

Q Was that done before or after the arrival of the other man?

A I only saw two people in there, and he was one of them that was there while I bought the coke.

Q And you put the white substance in his presence, or before you met him, or what was it?

A No, I was at a window on the outside of the building, and he didn't know that I was there when I put it in.

Q Had you bought the Coca-Cola before you met him, and you put the white substance in the coke before you met him?

A Yes, sir.

Q How did you introduce yourself to him when you identified yourself as being John?

A He approached me first and asked if my name was John, and I replied "Yes."

Q Then did you retire to some remote area [159] with this man, or did you stay near the stand, or where did you go to have a conversation with him?

A He asked me first if I cared to step outside, and I said, "Yes."

Q Where did you go?

A The big glass window—we just went outside the glass windows about two feet away from the hot dog stand.

Q Then what was said?

A He asked me if I had any marijuana or LSD for sale.

Q Tell us what he said, and what you said.

A I just replied that I might have some, and he asked me how much I was selling it for—

Q What answer did you give? Tell us what you said.

A I didn't answer him right then, and I asked what he wanted primarily, and he said he would rather have marijuana because marijuana is marijuana, and LSD could be anything, and I had this coke here, and I said, "Well, would you like to take some LSD right now?" and I showed him this coke with this aspirin bobbing around in it that I had broken up and—

Q Did you say the aspirin had broken up?

A No, I broke it up into little bits.

Q Did you put it in in his presence, or was [160] it already in the coke?

A I already broke it up when I put it in the coke.

Q You had already put it in before you had your conversation?

A Yes, sir.

Q In a broken form?

A Yes.

Q Then what next was said?

A Well, he jumped up a couple of feet, you know, jumped back a couple of feet, and he said that he never takes LSD, and then I asked him if he would care to go around the corner and smoke some marijuana, and he said, "No"; that he didn't want to smoke any marijuana; that he just wanted to buy.

Q Well, were you in a position to smoke a little marijuana with him at that time?

A No, sir.

Q Why did you offer to go around the corner and smoke it with him?

A Well, not necessarily go around the corner.

I even offered to take him to my house or to his

house, and he just didn't want to have anything to do with smoking marijuana.

Q Could you have produced some marijuana if you were to go to your house? [161]

A No, sir.

THE COURT: That's all.

MR. IDEMAN: Your Honor, I have a few more questions.

THE WITNESS: Sir, I have one more thing.

THE COURT: Yes?

THE WITNESS: He suggested that we go to his house, and maybe we could smoke some marijuana there after I sold some marijuana to him.

THE COURT: All right.

FURTHER RECROSS EXAMINATION

BY MR. IDEMAN:

Q Mr. Green, why would you not give Ray your last name over the telephone?

A I didn't think it was necessary.

Q Because you felt that you would be committing —you were about to commit a crime, and you didn't want him to know who you were; is that correct?

A No, I felt that if he were a police officer, I didn't want my name broadcast all over.

Q Why?

A Well, why not?

Q You didn't want him to know who you were, did you?

A Not if he was a police officer. [162]

Q Did you believe him to be a police officer?

A No, I said, "not if."

Q If he was a police officer, you didn't want him to know who you were; is that correct?

A Well, I wouldn't especially care for him to know. I don't want to be associated with narcotics.

Q What did you hope to accomplish by finding out whether or not this man was a police officer?

A Exactly what John asked me to do, to tell him whether he was or not.

Q Well, did you want to make it possible for Porter to sell more marijuana to the man if he was not a police officer?

A No, I didn't.

Q Well, you know—you knew at that time, at the time you went to meet this Ray, you knew that if he was a police officer, that Porter was caught. You knew that, didn't you?

You knew that he would be arrested eventually; didn't you know that?

A Well, I imagine since he already sold to him, or he said he had.

Q Right; you knew in fact that if he was a police officer, that Porter was going to be arrested. You knew that?

A Yes. [163]

Q All right. If he was not a police officer—you knew that if you could prove that he was not a police officer, then Porter could sell to him some more, didn't you?

A I don't know what John was going to do.

MR. IDEMAN: Nothing further of this witness.

FURTHER REDIRECT EXAMINATION

BY MR. COONEY:

Q Did John ever make any statement to you about taking off or leaving?

A Not that I remember.

Q I beg your pardon?

A Not that I remember. He never discussed that with me.

Q Now, there was a question asked you about a down payment on the automobile.

Had Mr. Porter actually given you a down payment?

A Yes, he had.

Q He gave you a down payment and took the automobile?

A No, he gave me some money after quite a while, after he had the car.

Q How long had he had the car?

A About three months. [164]

Q This Coca-Cola that you had, was there ice in it?

A No. [165]

* * *

MINUTES.

Superior Court of the State of California, for the County of Los Angeles. Department No. 77.

Apr. 7, 1967.

Present Hon. Prentiss Moore, Judge.

The People of the State of California vs. John Anthony Green. Case No. A101149.

APPEARANCES:

(Parties and Counsel checked if present. Counsel shown opposite parties represented.)

XEvelle J. Younger, District Attorney, by J. Ideman, Deputy, E. J. Hovden, Public Defender, by Deputy.

XTerrence W. Cooney.

Trial is resumed from April 6, 1967. John Anthony Green is recalled and further testifies for Defendant. Defendant's Exhibit A (bank book) is marked for identification only. The People's Exhibit 2 (bank book marked as Defendant's Exhibit A for identification only) is admitted in evidence. Both sides rest. The cause is argued by both counsel. The Court finds the Defendant "Guilty" as charged. Defendant waives time for sentence. A Probation Officer's report is ordered. Motion for a new trial and Probation and Sentence hearing are set for May 19, 1967 at 9:30 A.M. Defendant may remain on the same bail.

Declaration of Melvin John Porter.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff,
vs. John Anthony Green, Defendant. No. A 101149.

State of California, County of Los Angeles—ss.

I, MELVIN JOHN PORTER, declare as follows:

That JOHN ANTHONY GREEN has never sold me any narcotics or had anything to do with narcotics; that on or about January 15, 1967 I told a person named "Lughead" that I thought I sold some narcotics to a police officer and I was told by "Lughead" that the police would compel me to name some person as my supplier, and if I informed on him (Lughead) that he would have friends who would know about it and he would have me disposed of;

The same day or the next day I told JOHN the same thing and told him that I was in trouble and wanted him to help me; I asked JOHN to meet this Mr. Dominguez and try to find out if he was a police officer; it was my idea for JOHN to offer the man a Coke with some aspirin and offer to sell him some marijuana; that I told JOHN to get some aspirin to put in the Coke; that after JOHN had this conversation with the man he came over and told me that he thought the man was a police officer and advised me to turn myself in and make a full breast of my involvement; in fact, he insisted so strongly that when I was arrested I thought that JOHN had turned me in.

Later, when I was arrested and was in custody, the police kept telling me that they knew it was JOHN

GREEN I was involved with and that unless I implicated him that they would see that I was out of circulation for a long time; that I have made several statements about JOHN GREEN in the past because of numerous reasons, e.g. Fear of Threats; and inability to distinguish between reality and fantasy.

I am making this declaration upon the advice of my probation officer whom I contacted after JOHN GREEN was convicted; I regret having caused all this trouble for JOHN as I know he has always tried to advise me like an older brother or a father, and has always tried to help me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of May, at Sherman Oaks, California, 1967.

/s/ MEL PORTER
MEL JOHN PORTER

1

2

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 71 Present Hon. PRENTISS MOORE Judge
MAY 19 1967 19

APPEARANCES:

(Parties and Counsel checked if present.
Counsel shown opposite parties represented.)

Case No. A 101149

THE PEOPLE OF THE STATE OF
CALIFORNIA

☒ Evelle J. Younger, District Attorney, by
J. Ideman Deputy

vs

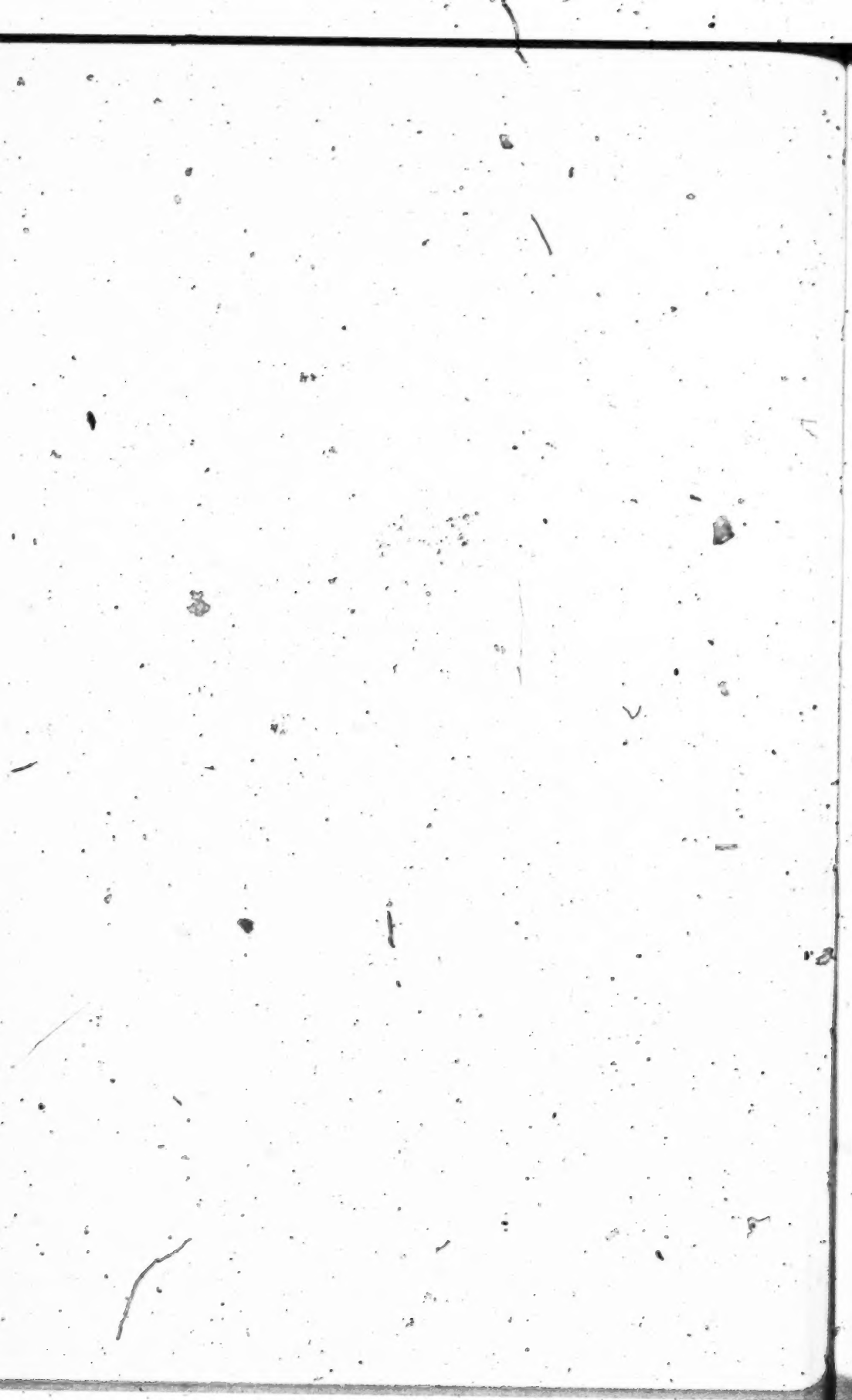
☐ E.J. Hovden, Public Defender, by
Deputy

☒ JOHN ANTHONY GREEN

☒ Terrance W Cooney

Motion for a new trial is denied.

- ☒ Proceedings suspended. Probation granted for five years
☒ Spend first year in County Jail. ☐ Road Camp or Honor Farm Recommended.
☐ Good time allowed if earned.
- ☐ Pay fine of \$ _____ through Probation Officer in such manner as such officer shall prescribe
- ☐ Make restitution through Probation Officer in such amounts and manner as such officer shall prescribe.
- ☐ Pay any judgment arising out of this matter, when it becomes final, in such amounts and manner as Probation Officer shall prescribe.
- ☐ Abstain from all alcoholic beverages and stay out of places where they are the chief item of sale.
- ☒ Not use or possess any narcotics or narcotic paraphernalia and stay away from places where addicts congregate.
- ☒ Not associate with known narcotic users or sellers.
- ☐ Submit to periodic anti-narcotic tests as directed by the Probation Officer.
- ☐ Have no blank checks in possession, not write any portion of any checks, not have bank account upon which may draw checks.
- ☐ Not gamble or engage in any bookmaking activities or have paraphernalia thereof in possession, and not be present in places where gambling or bookmaking is conducted.
- ☒ Not associate with Malvin John Porter
- ☐ Stay out of places where homosexuals congregate.
- ☐ Not associate with children under 14 years except in presence of responsible adults.
- ☐ Cooperate with Probation Officer in plan for psychiatric, psychological or other treatment.
- ☒ Seek and maintain employment as approved by Probation Officer.
- ☐ Support dependents, as directed by Probation Officer.
- ☒ Maintain residence as approved by Probation Officer.
- ☐ Surrender drivers license to Clerk of Court to be returned to Department of Motor Vehicles, and not drive a motor vehicle for the first year after release from custody nor until lawfully licensed.
- ☒ Obey all laws, orders, rules and regulations of Probation Department and of the Court.
- Motions for stay of execution and to fix bail on appeal are denied.
A notice of appeal is filed. Motions for rehearing motions to fix bail on appeal and for a stay of execution is set for May 26, 19, 1967, 9:30 A.M.



Notice of Appeal.

Superior Court of the State of California, for the County of Los Angeles.

The People of the State of California, Plaintiff, vs. John Anthony Green, Defendant. No. A 101 149.

TO THE CLERK OF THE ABOVE COURT,
AND TO THE DISTRICT ATTORNEY OF LOS
ANGELES COUNTY, AND TO THE PEOPLE OF
THE STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that the defendant, JOHN ANTHONY GREEN, does appeal to the District Court of Appeal, Second Appellate District, County of Los Angeles, State of California, from the Judgment and Sentence entered in this action against the defendant.

Dated: May 19, 1967.

COONEY & COONEY

Attorneys for Defendant

/s/ By Terrence W. Cooney

Terrence W. Cooney

OPINION OF THE SUPREME COURT OF THE
STATE OF CALIFORNIA.

In the Supreme Court of the State of California,
in Bank.

The People, Plaintiff and Respondent, v. John Anthony Green, Defendant and Appellant. Crim. 12753.

Filed March 21, 1969.

Defendant John Anthony Green was convicted of violating Health and Safety Code section 11532 (furnishing a narcotic to a minor) upon evidence consisting chiefly of the testimony and prior inconsistent statements of the minor to whom defendant allegedly furnished narcotics. Defendant challenges the constitutionality of Evidence Code section 1235, which provides for admission of prior inconsistent statements of a witness to prove the truth of the matters asserted therein, as applied to testimony elicited at a preliminary hearing. On the basis of recent decisions of this court and the United States Supreme Court, we conclude that section 1235 as so applied is unconstitutional and therefore the conviction must be reversed.

After a preliminary hearing, defendant was charged with furnishing marijuana to one Melvin Porter, a minor. He was tried and convicted by a court sitting without a jury. The chief witness for the prosecution was young Porter, who was markedly evasive and uncooperative on the stand. He testified that defendant had telephone him in January 1967 and asked him to sell some unidentified "stuff." He admitted he had obtained 29 plastic "baggies" of marijuana, some of which he sold and the rest of which was purportedly stolen from him. He testified that he was uncertain how he

obtained the marijuana, primarily because he was on "acid" (LSD) at the time and could not then distinguish fact from fantasy. At various points Porter was impeached by the prosecution by the use of his testimony at the preliminary hearing, in which he had stated that defendant had specifically asked him to sell marijuana and that he obtained the marijuana from the yard of defendant's parents' home, at the behest and direction of defendant. This preliminary hearing testimony was admitted as a prior inconsistent statement under section 1235 of the Evidence Code.¹

Following the deputy district attorney's reading of the preliminary transcript, Porter testified that his testimony at that hearing was the truth as he then believed it, and that his memory was now refreshed and he "guessed" he had obtained the marijuana from defendant's parents' yard and had given the money from its sale to defendant. However, on cross-examination Porter conceded that in fact it was his memory not of the events themselves but of the preliminary testimony which was refreshed, and he was still unsure and had no present recollection of the actual episode.

Later in the trial still another version of Porter's story was offered and admitted. Officer Wade testified that Porter had told him during a conversation at Juvenile Division headquarters that defendant came to Porter's house and personally delivered the marijuana to him. This statement was also admitted under Evidence Code section 1235 as a prior inconsistent statement. Like the preliminary hearing testimony, it was

¹We assume for purposes of discussion that the preliminary hearing testimony was in fact "inconsistent" with the witness' testimony at trial.

admitted for the purpose of proving the truth of the matter stated therein, as then sanctioned by the code.

Only one other item of evidence appeared to link defendant with Porter: the testimony of Officer Dominguez, an undercover officer, that he attempted to buy narcotics from Porter, who told him he would have a supplier named "John" contact him. In fact, defendant contacted Dominguez and purported to be a narcotics supplier; but when defendant insisted that Dominguez take narcotics with him to show good faith, the sale fell through. Defendant admitted the incident but explained that Porter asked him and he agreed to help expose a suspected undercover officer by a bogus sale. Defendant denied ever being in possession of narcotics. No charges were ever filed in connection with this purported transaction, and the trial court carefully limited its admission to the narrow purpose of showing that "Porter and the defendant had previous associations and were acquainted."

Defendant contends that the admission of the prior inconsistent statements of Porter as evidence of the truth of the matters stated therein—as opposed to admission for impeachment only—was unconstitutional and contrary to our recent holding in *People v. Johnson* (1968) 68 Cal.2d 646 (cert. denied 1969, 37 U.S.L. Week 3259), and that its admission constituted prejudicial error under the standards of *Chapman v. California* (1967) 386 U.S. 18. The People concede that the testimony of Officer Wade was inadmissible under *Johnson*, but assert that this error was not prejudicial.²

²There is no question but that both prior statements were offered, admitted, and considered as evidence of the facts stated therein. We cannot accept the tardy view propounded in the

As for the preliminary hearing testimony, the People urge that *Johnson* does not or should not preclude its evidentiary use since defendant had an opportunity to cross-examine the declarant Porter at the time the statement was made. This rationalization is not persuasive.

In *Johnson* we held that Evidence Code section 1235, insofar as it provides for admission of prior inconsistent statements as evidence of the truth of the matters stated therein, is unconstitutional when applied to testimony before a grand jury without the presence of the defendant, his counsel, or the ultimate trier of fact. As a consequence *Johnson* returned California law in this area to the general common law rule which prevailed prior to passage of the Evidence Code, limiting admission of prior inconsistent statements in criminal cases to impeachment purposes. Our decision was impelled by recent cases articulating the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution. (E.g., *Pointer v. Texas*

People's supplementary brief that the court did not rely upon this evidence, and in fact considered only the abortive transaction between defendant and Officer Dominguez as proof of defendant's guilt. In addition to his references to section 1235 at the time of admission, the deputy district attorney urged during closing argument that both these prior statements be considered "as much evidence . . . as if [Porter] said it from the witness stand. . . ." Moreover, we must take note of both the trial court's specific limitation, referred to earlier, of Officer Dominguez' testimony to showing that defendant and Porter were "acquainted," and the fact that the People in their opening brief rely heavily on Porter's statements in supporting the sufficiency of the evidence and specifically assert that the court "nowhere states that it did not believe that portion of Porter's testimony which . . . is sufficient to support the judgment." According to the People, "The trial court simply found that for all of Porter's obstinate evasiveness on the stand, the fact of appellant's furnishing stood clear in his mind." We read the trial court's opinion in accord with this latter statement.

(1963) 380 U.S. 400; *Barber v. Page* (1968) 390 U.S. 719.)

The complaining witnesses in *Johnson* had testified before the grand jury to acts of incest by the defendant. However, at trial these witnesses changed their stories and denied the truth of their prior testimony, claiming they had fabricated the incest charge out of spite. The grand jury testimony was admitted under Evidence Code section 1235, and on the basis of that evidence the defendant was convicted. We reversed, declaring that such evidentiary use of the grand jury testimony was in violation of the confrontation clause of the Constitution. In response to the People's contention that the witnesses could be cross-examined at trial, we stated: "To assert that the dangers of hearsay are 'largely nonexistent' when the declarant can be cross-examined at some later date, or to urge that such cross-examination puts the later trier of fact in 'as good a position' to judge the truth of the out-of-court statement as it is to judge contemporary trial testimony, is to disregard the critical importance of *timely* cross-examination." (Italics in original.) (*People v. Johnson* (1968) *supra*, 68 Cal.2d 646, 655.) Belated cross-examination before the trial court, such as was available to defendant in the instant case, is not an adequate substitute for the right to cross-examination contemporaneous with the original testimony before a different tribunal.

We recognize that the case before us differs from *Johnson* in a significant respect. Here, unlike *Johnson*, defendant had an opportunity to cross-examine the witness at the time the prior inconsistent statements

were made, i.e., at the preliminary hearing. This, assert the People, is a constitutionally adequate fulfillment of the right of confrontation. However, their contention overlooks the thrust of our opinion in *Johnson* and the realities of the preliminary hearing system, and directly conflicts with the recent stance of the United States Supreme Court.

Barber v. Page (1968) 390 U.S. 719, cited and relied upon in *Johnson*, involved the "unavailable witness" exception to the hearsay rule. A key witness who had testified at a preliminary hearing was confined in prison elsewhere at the time of trial. The prosecution made little or no effort to compel his presence at the trial, and instead was allowed to read into evidence the transcript of his preliminary testimony. The defendant had not cross-examined the witness at the preliminary hearing, although a codefendant had done so. There was a close question whether the defendant had waived his right to cross-examine at the preliminary hearing, but the court found no waiver and in effect found no opportunity for cross-examination. Concluding that the prosecution had not made a sufficient effort to have the witness present, the court ruled that no unavailability—and hence no "necessity"—was demonstrated to justify the "prior testimony" hearsay exception and to overcome the defendant's right of confrontation.

However, the opinion in *Barber v. Page* did not stop at that point. Since the question of cross-examination and waiver was close, the court went on to make its position unequivocally clear regarding the value of cross-examination at a preliminary hearing in lieu of cross-

examination at trial. In language we substantially quoted in *Johnson* (68 Cal.2d at p. 659 fn. 9), the high court stated: "Moreover, we would reach the same result . . . had petitioner's counsel actually cross-examined [the witness] at the preliminary hearing. . . . The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of testimony at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not . . . such a case." (Italics added.) (*Barber v. Page* (1968) *supra*, 390 U.S. 719, 725-726.) This expression was more than a mere dictum, as the Supreme Court has since demonstrated. In *Berger v. California* (1969) U.S. [89 S.Ct. 540], the *Barber* "unavailable witness" rule was made retroactive and was specifically applied to a case in which there was an opportunity for cross-examination at the preliminary hearing when the prior testimony was taken.⁸

⁸See also recent California cases which, even without the prompting of *Berger*, have applied *Barber* despite the presence of preliminary hearing cross-examination. (E.g., *People v. Harris* (1968) 266 A.C.A. 444; *People v. Casarez* (1968) 263 A.C.A. 132 ["extensively cross-examined"]; cf. *People v. King* (1969) 269 A.C.A. 35 [witness actually unavailable]; *Mason v. United States* (10th Cir. 1969) F.2d [4 Cr.L.Rptr. 3099, 3100] [testimony unavailable].)

The import of *Barber* and other recent Supreme Court decisions was spelled out in *Johnson*: "These rulings emphasize the high court's belief in the importance of ensuring the defendant's right to conduct his cross-examination before a *contemporaneous* trier of fact, i.e., before the same trier who sits in judgment on the truth of the witness' direct testimony as it is spoken from the stand." (*Italics in original*) (*People v. Johnson* (1968) *supra*, 68 Cal.2d 646, 659, 660.) We reiterate that the "contemporaneous" cross-examination, which alone, in the absence of a legal showing of necessity, can be considered fully effective and constitutionally adequate, is cross-examination at the *same time* as the direct testimony is given, before the *same trier* as must ultimately pass on the credibility of the witness and the weight of that testimony. In short, cross-examination neither may be *nunc pro tunc* nor may it be *tunc pro nunc*.⁴

In the instant case the only direct testimony of prior statements put before the trial court charged with its evaluation in terms of defendant's guilt, came by means of the deputy district attorney's reading of the cold transcript of the preliminary hearing. That the speaker of the words therein recorded had been cross-examined on another day, before another trier of fact, and for another purpose—i.e., to establish probability, not guilt—was without practical significance to the ultimate trier of fact, and we find the process lacking in con-

⁴In *Berger v. California* (1969) *supra*, U.S., [89 S. Ct. 540, 541], the high court stated that *Barber* was "foreshadowed, if not preordained" by *Pointer v. Texas*. Similarly, it could be said that the instant case was "foreshadowed, if not preordained" by *People v. Johnson*. (See *People v. Vinson* (1969) 268 A.C.A. 728.)

stitutional validity. Even had Porter's preliminary hearing cross-examination been read to the trial court—and it was not⁵—it could have been of limited use in assessing the value of the statements. It is elementary that the role of cross-examination is not simply to elicit a bald contradiction of the witness' direct testimony, a rare occurrence at best, but to focus the attention of the trier of fact on the witness' demeanor as he relates his story and then defends his version against the immediate challenge of the opposing attorney. By cross-examination "the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*Mattox v. United States* (1894) 156 U.S. 237, 242-243.) It is because demeanor—attitude and manner—is a significant factor in weighing testimonial evidence that it is axiomatic the trier of fact, before whom the witness testified and was cross-examined at trial, is the sole judge of the credibility of a witness and of the weight to be given his testimony.

Also lost in a cold reading of the preliminary transcript is the more subtle yet undeniable effect of counsel's rhetorical style, his pauses for emphasis and his variations in tone, as well as his personal rapport with the jurors, as he pursues his cross-examination. For example, Judge Leo R. Friedman has written (Essen-

⁵With one insignificant exception, Porter's preliminary cross-examination was not read to the court. Therefore, in this instance, the question of "contemporaneous" cross-examination, insofar as it concerned or even reached the ears of the ultimate trier of fact, is more academic than actual.

tials of Cross-Examination (Cont.Ed.Bar, 1968) p. 40) that while the lawyer "must keep control of himself . . . [t]his does not mean that the cross-examiner never should fight with a witness, raise his voice, or become angry. Forensic indignation, whether expressed physically or verbally, may produce good results in special circumstances." In addition, counsel may well conduct his cross-examination in a different manner before a committing magistrate than before a trial court or jury. Thus, states Friedman, counsel must always temper his cross-examination to the individual jurors, using their reactions as a guide to the most effective line of questioning. "The cross-examiner must remember that he is a performer and the jurors are his audience. No good performer ignores his audience, and all performances are conducted for the purpose of favorably impressing the audience." (*Id.* at p. 48.)^{*} We conclude that experience demonstrates the essentiality of truly contemporaneous cross-examination.

But leaving aside for the moment questions of subjective evaluation by the trier of fact, the Supreme Court in *Barber* clearly recognized that there is a substantial difference in the nature and purposes of preliminary and trial proceedings, regardless of whether there has been cross-examination. *Barber* points out that

^{*}Furthermore, we note that under the facts of the instant case, which are far from atypical, not only was Porter's preliminary hearing cross-examination not introduced, but cross-examination at trial regarding his prior statements would have proved futile. Porter asserted that his prior statements may have been what he believed at the time, but he now could not remember the events in question. Defense counsel was thus put in the awkward position of attempting to discredit a witness who had just testified in defendant's favor. If cross-examination of a hostile witness is a delicate process, cross-examination of a friendly witness—as to testimony given at a time when he was hostile—is an unusual exercise in diplomacy and futility.

the purpose of a preliminary hearing is not a full exploration of the merits of a cause or of the testimony of the witnesses. It is designed and adapted solely to answer the far narrower preliminary question of whether probable cause exists for a subsequent trial. The judge in preliminary proceedings is not required to be convinced of the defendant's guilt "beyond a reasonable doubt," but need only look for reasonable credibility in the charge against him.⁷ *A fortiori* a witness' testimony, though the only evidence adduced, need not be convincing or credible beyond a reasonable doubt, and cross-examination which would surely impeach a witness at trial would not preclude a finding of probable cause at the preliminary stage. Even given the opportunity (see *Jennings v. Superior Court* (1967) 66 Cal.2d 867), neither prosecution nor defense is generally willing or able to fire all its guns at this early stage of the proceedings, for considerations both of time and efficacy. (Letwin, *Waiver of Objections to Former Testimony* (1967) 15 U.C.L.A. L.Rev. 118, 124.) Indeed, it is seldom that either party has had time for investigation to obtain possession of adequate information to pursue in depth direct or cross-examination.

⁷Penal Code section 872 provides in relevant part: "If . . . it appears from the [preliminary] examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must [endorse the complaint]." "Sufficient cause" is "equivalent in meaning to 'reasonable and probable cause'" (*Perry v. Superior Court* (1962) 57 Cal.2d 276, 283), and the evidence before the committing magistrate "need not be such as would require a conviction." (*People v. Nagle* (1944) 25 Cal.2d 216, 222.)

| Were we to equate preliminary and trial testimony one practical result might be that the preliminary hearing, designed to afford an efficient and speedy means of determining the narrow question of probable cause,⁸ would tend to develop into a full-scale trial. This would invite thorough and lengthy cross-examination, with the consequent necessity of delays and continuances to bring in rebuttal and impeachment witnesses, to gather all available evidence, and to assure generally that nothing remained for later challenge. In time this result would prostitute the accepted purpose of preliminary hearings and might place an intolerable burden on the time and resources of the courts of first instance.⁹

Although we recognize that some of the same practical difficulties exist, nothing we say here is intended to affect or cast doubt upon the viability or constitutionality of the long-established "prior testimony" exception to the hearsay rule. (Evid. Code, §§ 1290-1292.) This exception, as *Barber* points out, adds the factor of necessity to the constitutional aspect of confrontation—which factor may, in appropriate cases, out-

⁸"The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial." (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 150.)

⁹Approximately 85 percent of felony proceedings in California superior courts originate in preliminary hearings. (Crime and Delinquency in Cal.: Report of Bureau of Criminal Statistics (1965) p. 66.) In the fiscal year of 1966-1967, this represented 64,308 felony preliminary filings in municipal courts and 7,256 in justice courts. (Annual Rep. of Judicial Council of Cal. (1968) pp. 107, 145.)

weigh the lack of contemporary cross-examination.¹⁰ Of course, no such "necessity" exists where the witness is present to testify at trial under oath, but for some disclosed or undisclosed reason does not relate the same version of events that he told previously and that a party anticipates he will tell.¹¹ This is strictly a question of *credibility*, to be dealt with, as has always been the case, by the use of immediate and contemporaneous cross-examination and the introduction of the prior inconsistent testimony or statements for purposes of *impeachment*.

In summary, the rules that emerge from the cases and principles are these: cross-examination at trial relating to a statement or testimony given previously is constitutionally inadequate. (*Johnson*.) Cross-examination at the time of the statement, e.g., at a preliminary hearing, before a judge or agency other than the trier of fact charged with the ultimate determination of credibility and guilt, is likewise constitutionally inadequate.

¹⁰Evidence Code section 1291 admits former testimony when the present defendant was a party to the hearing at which that testimony was taken "and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he had at the [present] hearing." Although preliminary hearing testimony was clearly contemplated by section 1291 (see comments thereto), the Supreme Court in *Pointer v. Texas* and *Barber v. Page* left open the question whether such prior testimony satisfies the confrontation clause of the Constitution, and we have no occasion to consider that question at this time. (But see *People v. King* (1969) *supra*, 269 A.C.A. 35, 42.)

¹¹"It is one thing to use prior testimony or out-of-court declarations under well formulated hearsay exceptions when the witness is dead, incompetent, or out of the jurisdiction. It is an entirely different matter to use such testimony as substantive

quate. (*Barber*.) A combination of these two negatives obviously cannot produce a positive. Therefore, cross-examination at trial on prior testimony, together with cross-examination at the time of the statement before a different trier of fact, is not a valid substance for constitutionally adequate confrontation. The facts in the instant case compose that combination of negatives, compelling us to conclude that defendant was denied the right of confrontation guaranteed by the Sixth Amendment to the Constitution. Both prior statements by Porter should have been excluded for any purpose other than impeachment.

We pause to note, as we did in *Johnson* (68 Cal.2d at p. 658), that the Legislature was not unmindful of the likelihood that its overly broad approval of the use of hearsay in criminal cases would have constitutional implications. Thus it provided in Evidence Code section 1204: "A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California."

evidence when the witness is in court and able to testify before the very forum that is going to pass judgment on a defendant who is on trial for his life or freedom. In the former situation, the hearsay is reasonably reliable and is presumably presented to the jury in good faith since it is the only evidence available. In the latter situation the hearsay is no longer reliable, and it is not the only evidence available." (*People v. Vinson* (1969) *supra*, 268 A.C.A. 728, 733.)

Since the two most damaging statements of the witness Porter are inadmissible as substantive evidence, and since we find no other substantial evidence of a narcotics transaction between Porter and defendant on the date charged, the prejudicial nature of the error is manifest (see fn. 1, *ante*), and the judgment of conviction must be reversed. (*Chapman v. California* (1967) *supra*, 386 U.S. 18.) We need not reach defendant's additional contentions of insufficiency of the evidence, suppression of evidence, and prejudicial misconduct.

The judgment is reversed.

Mosk, J.

We Concur:

Traynor, C. J.

McComb, J.

Peters, J.

Tobriner, J.

Burke, J.

Sullivan, J.

Supreme Court of the United States.

January 12, 1970 .

California v. John Anthony Green No. 387, October
Term, 1969.

**ORDER GRANTING MOTION FOR LEAVE TO PRO-
CEED IN FORMA PAUPERIS AND GRANTING
PETITION FOR WRIT OF CERTIORARI.**

"The motion of the respondent for leave to pro-
ceed *in forma pauperis* is granted. The petition
for a writ of certiorari is also granted and the case
is placed on the summary calendar."